

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

-----:
AIMS INSTITUTE, PLLC, et al., :
:
Plaintiffs, :
: Civil Action:
vs. : 4:22-cv-02396
:
MERRICK GARLAND, et al., :
:
Defendants. :
-----:

VIDEO-RECORDED DEPOSITION OF KELLEIGH MILLER

DATE: Thursday, January 5, 2023
TIME: 9:37 a.m.
LOCATION: United States Attorney's Office
2100 Jamieson Avenue
Alexandria, Virginia 22314
REPORTED BY: Erick M. Thacker
Reporter, Notary

Veritext Legal Solutions
1250 Eye Street, NW, Suite 350
Washington, D.C. 20005

<p>1 Q -- in the processing unit?</p> <p>2 A -- four government information</p> <p>3 specialists assigned to that team right now and a</p> <p>4 GS-14 unit chief that supervises.</p> <p>5 Q And what is a government information</p> <p>6 specialist?</p> <p>7 A So these are -- these are employees</p> <p>8 that process FOIA cases. So government</p> <p>9 information specialist is the title of the</p> <p>10 majority of the folks in our office.</p> <p>11 Q Okay. And then legal and external, how</p> <p>12 many folks work in legal and external?</p> <p>13 A I have two government information</p> <p>14 specialists assigned to that team right now, and</p> <p>15 I have one GS-14 unit chief running that unit.</p> <p>16 Q And her name is Angela Hertel, right?</p> <p>17 A Correct.</p> <p>18 Q And she's been working there for, I</p> <p>19 guess, a few years, right?</p> <p>20 A Over -- she's been part of our FOIA</p> <p>21 office for a little over ten years, I believe.</p> <p>22 Q Interestingly, she's usually the</p> <p style="text-align: right;">Page 26</p>	<p>1 is part of the DOJ chief -- could you just --</p> <p>2 A Sure.</p> <p>3 Q -- explain that to me --</p> <p>4 A I can clarify.</p> <p>5 Q -- a little bit.</p> <p>6 A We are --</p> <p>7 Q Yeah.</p> <p>8 A -- part of the DEA's Office of Chief</p> <p>9 Counsel.</p> <p>10 Q Okay. So you guys are part of the</p> <p>11 Office of Chief Counsel, but you report to</p> <p>12 Ms. DuBois, who is at DOJ --</p> <p>13 A DEA.</p> <p>14 Q Oh, at --</p> <p>15 A Yes.</p> <p>16 Q -- DEA.</p> <p>17 THE REPORTER: You-all are starting to</p> <p>18 speak over each other. If you could --</p> <p>19 THE WITNESS: Sorry.</p> <p>20 THE REPORTER: -- just wait for the --</p> <p>21 THE WITNESS: Sorry.</p> <p>22 THE REPORTER: -- end of the question.</p> <p style="text-align: right;">Page 28</p>
<p>1 witness that the agency puts up in a FOIA case.</p> <p>2 This is a privilege for me to be able to have the</p> <p>3 chief.</p> <p>4 So -- and so this is -- these are the</p> <p>5 three units, and then you supervise these three</p> <p>6 units, correct?</p> <p>7 A Correct.</p> <p>8 Q And who do you report to?</p> <p>9 A So I report to the section chief of the</p> <p>10 FOIA and information law section at DEA.</p> <p>11 Q Okay. And who is that?</p> <p>12 A That is Brooke DuBois.</p> <p>13 Q Okay. And is that -- is that in a</p> <p>14 different DOJ component?</p> <p>15 A No. So we are part of the Office of</p> <p>16 Chief Counsel, and so the FOIA and information</p> <p>17 law section is one of the many sections within</p> <p>18 the Office of Chief Counsel that we report up to.</p> <p>19 Q So -- so when you say "we" and --</p> <p>20 because you're here representing DOJ and -- and</p> <p>21 DEA, so I just want the record to be clear.</p> <p>22 Are you saying that the DEA FOIA office</p> <p style="text-align: right;">Page 27</p>	<p>1 BY MR. ZORN</p> <p>2 Q Okay. So -- so you report to</p> <p>3 Ms. DuBois, who's in the DEA's chief counsel</p> <p>4 office?</p> <p>5 A Correct.</p> <p>6 Q And then Ms. DuBois reports to?</p> <p>7 A Sandra Stevens, who is the deputy chief</p> <p>8 of the Office of Chief Counsel at DEA.</p> <p>9 Q Okay. And Ms. Stevens reports to?</p> <p>10 A Hallie Hoffman, who is the chief</p> <p>11 counsel for DEA.</p> <p>12 Q And I will assume that Ms. Hoffman</p> <p>13 reports to the administrator, correct?</p> <p>14 A Correct.</p> <p>15 Q What are your responsibilities as the</p> <p>16 chief FOIA officer for DEA?</p> <p>17 A So my responsibilities are to oversee</p> <p>18 the overall administration of the FOIA and the</p> <p>19 Privacy Act at DEA.</p> <p>20 Q Okay. And -- and the responsibilities</p> <p>21 that you have are in the FOIA statute, right?</p> <p>22 A Correct.</p> <p style="text-align: right;">Page 29</p>

<p>1 MR. ZORN: And why don't we pull that 2 up. So I'm going to introduce -- I'm going to 3 get creative. I'm going to call this Exhibit 4 FOIA. Let's see. 5 All right. I have introduced into the 6 folder Exhibit capital F-O-I-A. 7 (Deposition Exhibit FOIA 8 was marked for identification.) 9 MR. RODRIGUEZ: Sorry. 10 THE WITNESS: That's okay. 11 BY MR. ZORN 12 Q And can we turn to -- it's page 25 of 13 the document. You can see at the bottom right -- 14 well, first, can you confirm for me at least as 15 for the first page that this is 5 U.S. Code 16 section 552? 17 A It is. 18 Q And that's -- that's the FOIA -- 19 A Correct. 20 Q -- citation? 21 A Yes. 22 Q And this is from -- I think I got it</p> <p style="text-align: right;">Page 30</p>	<p>1 MR. ZORN: Sure. 2 MR. RODRIGUEZ: -- here. 3 MR. ZORN: Sure. 4 MR. RODRIGUEZ: Sorry about that. 5 Yeah, we're good now. 6 BY MR. ZORN 7 Q Okay. So the chief -- I'm going to 8 read it again. 9 "The Chief FOIA Officer of each agency 10 shall, subject to the authority of the head of 11 the agency." 12 Did I read (j)(2) correctly? 13 A You did. 14 Q And the chief FOIA officer of DEA is 15 you, Ms. Kelleigh Miller, correct? 16 A Correct. 17 Q And we can agree that the Drug 18 Enforcement Administration is an agency, correct? 19 A It is. 20 Q So in (j)(2), the chief FOIA officer of 21 DEA is you? 22 A Correct.</p> <p style="text-align: right;">Page 32</p>
<p>1 from the Cornell U.S. law U.S. code. 2 Have you ever been to that -- 3 A I have been to this. Typically, when I 4 want to look up 552, I will go to the 5 electronic -- or I'm sorry -- the -- I'll just go 6 to the United States code website to get it. 7 Q But it's a statute that -- that DOJ and 8 DEA is -- is familiar with? 9 A Correct. 10 Q Okay. So if you can scroll to page 25, 11 and I want to look at -- on page 25, I want to 12 look at (j)(2). And just tell me when you're 13 there. 14 So it says, "The Chief FOIA Officer of 15 each agency shall, subject to the authority of 16 the head of the agency." 17 I want to stop there. So the chief 18 FOIA officer is -- 19 MR. RODRIGUEZ: Could you hold on? 20 MR. ZORN: Yes. 21 MR. RODRIGUEZ: Let me -- let us get to 22 the page --</p> <p style="text-align: right;">Page 31</p>	<p>1 Q Okay. And A is "have agency-wide 2 responsibility for efficient and appropriate 3 compliance with this section." 4 As the chief FOIA officer, that is one 5 of your responsibilities, correct? 6 A Correct. 7 Q That's statutory? 8 A Correct. 9 Q B, "monitor implementation of this 10 section throughout the agency and keep the head 11 of the agency, the chief legal officer of the 12 agency, and the Attorney General appropriately 13 informed of the agency's performance in 14 implementing this section." 15 That's one of your responsibilities, 16 correct? 17 A It is. 18 Q And that's because you are the chief 19 FOIA officer of DEA? 20 A Correct. 21 Q Okay. C, "recommend to the head of the 22 agency such" -- and I'll just pause there. That</p> <p style="text-align: right;">Page 33</p>

<p>1 in this case is -- is the Honorable Anne Milgram,</p> <p>2 correct?</p> <p>3 A Correct.</p> <p>4 Q "Such adjustments to agency practices,</p> <p>5 policies, personnel, and funding as may be</p> <p>6 necessary to improve its implementation of the</p> <p>7 section."</p> <p>8 That's something you do, right?</p> <p>9 A Correct.</p> <p>10 Q And is it something you do through this</p> <p>11 chain of command, or do you -- do you actually</p> <p>12 get to speak to Ms. Milgram?</p> <p>13 A No. This is done through my chain of</p> <p>14 command.</p> <p>15 Q Okay. So you don't get to speak to</p> <p>16 Ms. Milgram, like -- because I'm having trouble</p> <p>17 with that, too --</p> <p>18 A Generally, no.</p> <p>19 Q -- I would say. Okay.</p> <p>20 So -- so let's do D.</p> <p>21 "Review and report to the Attorney</p> <p>22 General, through the head of the agency, at such</p> <p style="text-align: right;">Page 34</p>	<p>1 officer, her name is Vanita Gupta, right?</p> <p>2 A I am forgetting, because I actually</p> <p>3 deal primarily with Bobby Talebian, who is the</p> <p>4 chief of the Office of Information Policy, but I</p> <p>5 forget the name of the DOJ's chief FOIA officer.</p> <p>6 I don't have any interaction with that</p> <p>7 individual.</p> <p>8 Q Okay. So you don't interact with the</p> <p>9 chief FOIA officer of the Department of Justice,</p> <p>10 and you, meaning Kelleigh Miller, the chief FOIA</p> <p>11 officer of DEA, doesn't interact with the chief</p> <p>12 FOIA officer of DOJ, assuming it is Vanita Gupta?</p> <p>13 A I do not.</p> <p>14 Q Okay. You -- you, as in Kelleigh Ms.</p> <p>15 Miller, does interact with a gentleman named</p> <p>16 Bobby Talebian, correct?</p> <p>17 A Bobby Talebian, but primarily his</p> <p>18 staff. That's the Office of Information Policy.</p> <p>19 This is essentially the FOIA office for DOJ. We</p> <p>20 have a lot of interaction with that office, yes.</p> <p>21 Q Okay. And what -- what types of</p> <p>22 matters do you discuss with the DOJ?</p> <p style="text-align: right;">Page 36</p>
<p>1 times and in which formats as the Attorney</p> <p>2 General may direct, on the agency's performance</p> <p>3 in implementing this section."</p> <p>4 And so I'll just make this open-ended.</p> <p>5 That's something you do, true?</p> <p>6 A We do that.</p> <p>7 Q And how does the agency do that?</p> <p>8 A We accomplish this through our annual</p> <p>9 reporting through the -- the -- I'm sorry -- the</p> <p>10 annual FOIA reports and the chief FOIA officer</p> <p>11 report that we complete every year and we send</p> <p>12 through our chain of command to the Department of</p> <p>13 Justice. And then they prepare the DOJ chief</p> <p>14 office -- chief officer reports and annual FOIA</p> <p>15 reports that gets submitted to the attorney</p> <p>16 general.</p> <p>17 Q And the DOJ chief FOIA officer</p> <p>18 is Associate Attorney General Vanita Gupta,</p> <p>19 right?</p> <p>20 A Could you ask the question again? I'm</p> <p>21 sorry.</p> <p>22 Q The DE- -- the DOJ's chief FOIA</p> <p style="text-align: right;">Page 35</p>	<p>1 A Sure. So the Office of Information</p> <p>2 Policy, otherwise known as OIP, handles all of</p> <p>3 the administrative appeals. So any time a</p> <p>4 requester is unsatisfied with our determination</p> <p>5 to their FOIA request, they have the right to</p> <p>6 file an administrative appeal.</p> <p>7 The department will come back to us and</p> <p>8 ask us for all the background materials on the</p> <p>9 request. They may have some questions for us.</p> <p>10 So we -- we deal with them heavily on the</p> <p>11 administrative appeal process.</p> <p>12 We also participate in trainings that</p> <p>13 OIP conducts throughout the year. We attend</p> <p>14 various meetings that OIP hosts and things like</p> <p>15 that.</p> <p>16 Q Have you attended the Chief FOIA</p> <p>17 Officers Council?</p> <p>18 A I have, yes.</p> <p>19 Q Okay. And that's run by</p> <p>20 Mr. Talebian --</p> <p>21 A It is --</p> <p>22 Q -- true?</p> <p style="text-align: right;">Page 37</p>

<p>1 A -- I believe, yes.</p> <p>2 Q I've learned more about FOIA than I</p> <p>3 ever wanted to know.</p> <p>4 So let's just continue here.</p> <p>5 So, E, "facilitate public understanding</p> <p>6 of the purposes of the statutory exemptions of</p> <p>7 this section by including concise descriptions of</p> <p>8 the exemptions in both the agency's handbook</p> <p>9 issued under subsection (g) and the agency's</p> <p>10 annual report on this section, and by providing</p> <p>11 an overview, where appropriate, of certain</p> <p>12 general categories of agency records to which</p> <p>13 those exemptions apply."</p> <p>14 Did I read that correctly?</p> <p>15 A You did.</p> <p>16 Q Okay. And that's -- that's your</p> <p>17 responsibility as the chief FOIA officer of DEA,</p> <p>18 true?</p> <p>19 A It is.</p> <p>20 Q Okay. And, F, "offer training to</p> <p>21 agency staff regarding their responsibilities."</p> <p>22 And you, as the chief FOIA officer,</p> <p style="text-align: right;">Page 38</p>	<p>1 Q And who is that?</p> <p>2 A That is Desheila Wallace.</p> <p>3 Q Okay. Are you a senior official at</p> <p>4 DEA?</p> <p>5 A I would -- well, I'm -- I mean, I'm a</p> <p>6 section chief, so I would consider it to be a</p> <p>7 senior manager.</p> <p>8 Q Would you consider yourself to be a</p> <p>9 senior official at the -- well, let me say: Does</p> <p>10 DEA and -- and/or DOJ consider you to be a senior</p> <p>11 official?</p> <p>12 A I believe so.</p> <p>13 Q Okay. Why?</p> <p>14 A I think because of my role as the --</p> <p>15 the chief FOIA officer for DEA, because of my</p> <p>16 grade level in the government, and my</p> <p>17 responsibilities.</p> <p>18 Q Okay. Are you a political appointee?</p> <p>19 A I am not.</p> <p>20 Q Were you -- are you at the assistant</p> <p>21 secretary or equivalent level?</p> <p>22 A I am not.</p> <p style="text-align: right;">Page 40</p>
<p>1 offer training?</p> <p>2 A We do.</p> <p>3 Q Okay. And I cut off the last three</p> <p>4 words of that. I just want the record to be</p> <p>5 clear. It says "under this section." I</p> <p>6 didn't -- I didn't put that in.</p> <p>7 So, G, "serve as the primary agency</p> <p>8 liaison with the Office of Government Information</p> <p>9 Services and the Office of Information Policy."</p> <p>10 Did I read that correctly?</p> <p>11 A You did.</p> <p>12 Q And when we were talking about OIP,</p> <p>13 that's the Office of Information Policy, correct?</p> <p>14 A Correct.</p> <p>15 Q Okay. And then the final point of this</p> <p>16 (j)(2) is H, "designate 1 or more FOIA public</p> <p>17 liaisons."</p> <p>18 Did I read that correctly?</p> <p>19 A You did.</p> <p>20 Q And the DEA has a FOIA public liaison,</p> <p>21 correct?</p> <p>22 A We do.</p> <p style="text-align: right;">Page 39</p>	<p>1 Q Okay. Who at DEA is at the assistant</p> <p>2 secretary or equivalent level?</p> <p>3 A I would consider that to be our SES</p> <p>4 personnel.</p> <p>5 Q Okay.</p> <p>6 A Senior executives.</p> <p>7 Q And who are those?</p> <p>8 A Those are generally the individuals</p> <p>9 that run the divisions at DEA.</p> <p>10 Q Okay. And can you -- can you name them</p> <p>11 for me?</p> <p>12 A I mean, I can give you titles probably</p> <p>13 better. Like the chief of the intelligence</p> <p>14 division, the chief of operations, the chief</p> <p>15 counsel.</p> <p>16 Q Okay.</p> <p>17 A Our special agents in charge in the</p> <p>18 field, perhaps.</p> <p>19 Q So did it ever occur to you that you're</p> <p>20 being underpaid?</p> <p>21 A No.</p> <p>22 Q Can we look at (j)(1)? It's right</p> <p style="text-align: right;">Page 41</p>

<p>1 above (j)(2). 2 Can you read (j)(1)? 3 A Would you like me to read (j)(1)? 4 Q Yes. Yes, please. 5 A "Each agency shall designate a Chief 6 FOIA Officer who shall be a senior official of 7 each agency (at the Assistant Secretary or 8 equivalent level)." 9 Q You're the chief FOIA officer of DEA, 10 true? 11 A Correct. 12 Q You are not at the assistant secretary 13 or equivalent level, are you? 14 A I am -- 15 MR. RODRIGUEZ: Objection. Calls for 16 legal conclusion. 17 You can still answer. 18 THE WITNESS: I am not. 19 BY MR. ZORN 20 Q Okay. So let's -- let's assume -- with 21 your counsel's objection, let's assume you're 22 correct. Then DEA currently has a chief FOIA</p> <p style="text-align: right;">Page 42</p>	<p>1 And it's a little bit beyond the scope 2 of the -- the topics, so if -- I'm not going to 3 suggest that you're unprepared, but just for 4 foundation, do you know what the Office of Legal 5 Counsel at the Department of Justice is? 6 A Maybe I do not. 7 Q Okay. So do you know what an OLC 8 opinion is? 9 A No. 10 Q Okay. Well -- so you don't know about 11 an OLC opinion by a person named Paul Colborn? 12 A I am not familiar with that, no. 13 Q Okay. Well, I'm going to do something 14 very unorthodox. 15 You represent -- you're here today on 16 behalf of the Department of Justice, correct? 17 A Yes. 18 Q Okay. And I'm going to give you a FOIA 19 request here for that OLC opinion. 20 (Deposition Exhibit OLC 21 was marked for identification.) 22 MR. RODRIGUEZ: I object to the extent</p> <p style="text-align: right;">Page 44</p>
<p>1 officer that is contrary to what this says, true, 2 under the assumption that your prior answer is 3 correct, that you are not the assistant secretary 4 or equivalent level? 5 A True. 6 Q Okay. And, in fact, there's an Office 7 of Legal Counsel opinion on this. 8 Have you ever read it? 9 A I have not. 10 Q Well, the Department of Justice has 11 read it, right? 12 A I am unsure. 13 Q Because the office of -- do you know 14 what the Office of Legal Counsel is? 15 A Yes. 16 Q Okay. So what is the Office of Legal 17 Counsel? 18 A Meaning the Office of Legal Counsel at 19 DOJ or -- or DEA? Maybe I misunderstood. I'm 20 sorry. 21 Q The DOJ Office of Legal Counsel, are 22 you familiar with that?</p> <p style="text-align: right;">Page 43</p>	<p>1 that she's here to provide testimony on the 2 topics that you've designated. She's not here as 3 a representative of the Department of Justice at 4 large. 5 MR. ZORN: Fair enough. I'm going 6 to -- I'm going to -- I'll submit -- after the 7 deposition, I'll submit it normally. 8 BY MR. ZORN 9 Q But -- but could you just read my 10 request out there? 11 A "I hereby request the OLC document 12 containing the opinion/agency conclusion about 5 13 USC 552(j)(2)," signed Matthew Zorn. 14 Q Oh, sorry. It should be (j)(1). Let 15 me -- let me -- 16 A Okay. 17 Q -- correct this exhibit. Okay. I'm 18 not going to make you reread this. 19 A Okay. 20 MR. ZORN: Okay. So -- but let's -- 21 let's move to a different exhibit. I'm going to 22 introduce Exhibit 8.</p> <p style="text-align: right;">Page 45</p>

<p>1 memo, and Exhibit 2, which is the statute.</p> <p>2 MR. ZORN: So I -- there should be an</p> <p>3 Exhibit 2 - 30(b)(6) depo notice.pdf --</p> <p>4 MR. GRAY: Refresh the --</p> <p>5 MR. ZORN: -- uploaded. If you -- you</p> <p>6 have to refresh --</p> <p>7 MR. RODRIGUEZ: Okay.</p> <p>8 MR. ZORN: -- and it's -- it's -- I</p> <p>9 kind of pre-titled some of them, and I'm</p> <p>10 switching around the order. So the confusion is</p> <p>11 my --</p> <p>12 MR. RODRIGUEZ: Now we have it.</p> <p>13 THE WITNESS: Okay.</p> <p>14 MR. RODRIGUEZ: So I needed to refresh</p> <p>15 the folder.</p> <p>16 MR. ZORN: I needed to title these</p> <p>17 things better, so multiple -- all right.</p> <p>18 BY MR. ZORN</p> <p>19 Q So we have 30(b)(6). This is 9:32 a.m.</p> <p>20 And just let me know when you have it up.</p> <p>21 A We do.</p> <p>22 Q Okay. So do you see that this is a</p> <p style="text-align: right;">Page 54</p>	<p>1 fair?</p> <p>2 A Correct.</p> <p>3 Q The second is "The description of DEA's</p> <p>4 FOIA processing office, including its location,</p> <p>5 its general contents, and the employees working</p> <p>6 in the FOIA processing office."</p> <p>7 Did I read that correctly?</p> <p>8 A You did.</p> <p>9 Q And earlier we -- since -- since --</p> <p>10 since we're on the topic, earlier, we spoke about</p> <p>11 the structure of the DEA FOIA office, didn't we?</p> <p>12 A We did.</p> <p>13 Q And we said -- and you testified that</p> <p>14 there was an intake office, and then there was a</p> <p>15 processing office, and those two were different.</p> <p>16 A We have three units, so I oversee three</p> <p>17 units, one being the intake subunit, the</p> <p>18 processing subunit, and the legal and external</p> <p>19 affairs subunit --</p> <p>20 Q All right.</p> <p>21 A -- that make up the FOIA Privacy Act</p> <p>22 unit at DEA.</p> <p style="text-align: right;">Page 56</p>
<p>1 notice of deposition 30(b)(6) to the U.S.</p> <p>2 Department of Justice and U.S. Drug Enforcement</p> <p>3 Administration?</p> <p>4 A Yes.</p> <p>5 Q And at the top of the page, you see</p> <p>6 there's a blue header; is that correct? The very</p> <p>7 top of the page.</p> <p>8 A Yes.</p> <p>9 Q All right. And let's go to page 3 of</p> <p>10 the document and just confirm for me that it says</p> <p>11 Exhibit A at the -- towards the top of the page.</p> <p>12 A It does.</p> <p>13 Q Okay. And then if we go to page 4,</p> <p>14 you'll see there's a list of 30(b)(6) topics for</p> <p>15 DOJ and DEA. Do you see that?</p> <p>16 A I do.</p> <p>17 Q And these are the topics that you are</p> <p>18 prepared for and are prepared to testify today on</p> <p>19 behalf of DOJ and DEA, true?</p> <p>20 A Correct.</p> <p>21 Q And the first topic, A1, is "The</p> <p>22 structure and operation of DEA FOIA office,"</p> <p style="text-align: right;">Page 55</p>	<p>1 Q And I actually want to skip around</p> <p>2 here. I'm just curious. Who makes the unusual</p> <p>3 circumstances determination?</p> <p>4 A Generally, the intake unit.</p> <p>5 Q Okay. And what is that determination</p> <p>6 based on?</p> <p>7 A So at DEA, we will invoke unusual</p> <p>8 circumstances any time we have to search for</p> <p>9 records that are outside of our office, meaning</p> <p>10 we do not have possession of all of DEA's</p> <p>11 records.</p> <p>12 We have many offices throughout</p> <p>13 headquarters, the field. We have offices in</p> <p>14 about 90 foreign countries. So we do not have</p> <p>15 access to all of those records in my own office.</p> <p>16 We have to rely on the record custodians to</p> <p>17 retrieve those records for us.</p> <p>18 Q So by office in your answer, you mean</p> <p>19 the FOIA office?</p> <p>20 A The FOIA office.</p> <p>21 Q So any time a record that is requested</p> <p>22 in a FOIA request that is not in the FOIA office</p> <p style="text-align: right;">Page 57</p>

<p>1 presents the unusual circumstances exception?</p> <p>2 A Correct.</p> <p>3 Q And we'll get into the documents in a</p> <p>4 moment, but what percentage of requests raise</p> <p>5 unusual circumstances at the Drug Enforcement</p> <p>6 Administration?</p> <p>7 A So we do not track the actual</p> <p>8 percentage. However, the data that reflects how</p> <p>9 often we invoke unusual circumstances is captured</p> <p>10 in the annual FOIA reports that are available on</p> <p>11 the OIP -- the Department of Justice Office of</p> <p>12 Information Policy website.</p> <p>13 There is a column there where you can</p> <p>14 see 20 or 30 days. 30 days indicates that we</p> <p>15 have invoked unusual circumstances for those</p> <p>16 cases for that particular fiscal year.</p> <p>17 Q Is a complex request always going to</p> <p>18 raise unusual circumstances?</p> <p>19 A So the definition of complex and simple</p> <p>20 is different than unusual circumstances.</p> <p>21 While there may be a close proxy there,</p> <p>22 complex and -- you know, to -- I would -- the</p> <p style="text-align: right;">Page 58</p>	<p>1 uses, you know, the paper-based filing systems</p> <p>2 that our offices all over the United States, you</p> <p>3 know, utilize.</p> <p>4 So we -- when we receive a FOIA</p> <p>5 request, oftentimes, we are searching for paper</p> <p>6 and electronic records. We simply don't have</p> <p>7 access to all that.</p> <p>8 Now, if for some reason I did have</p> <p>9 access to a record because maybe that record has</p> <p>10 been requested by another individual previously,</p> <p>11 we would have access. I would not be invoking</p> <p>12 unusual circumstances because I already have</p> <p>13 access. I'm just going to review it and release</p> <p>14 it again, if that makes sense.</p> <p>15 Q So the office has access to records</p> <p>16 that have been previously requested?</p> <p>17 A Correct.</p> <p>18 Q And if those records get requested a</p> <p>19 third time, then they have to get posted</p> <p>20 publicly?</p> <p>21 A We are supposed to post them, correct.</p> <p>22 Q So really the only time that I can tell</p> <p style="text-align: right;">Page 60</p>
<p>1 best way I can put this is that we define a</p> <p>2 complex case by any time that we feel it's going</p> <p>3 to take us more than a month to process records.</p> <p>4 The reason for that is, the records may involve a</p> <p>5 high volume. If we have hundreds of pages or</p> <p>6 thousands of pages for review, we're not going to</p> <p>7 be able to produce it within 30 days. So</p> <p>8 anything that takes us longer than 30 days, we</p> <p>9 deem that to be complex.</p> <p>10 Q Now, when you say in the FOIA office,</p> <p>11 are you talking about, like, physically, like,</p> <p>12 sitting in the FOIA office?</p> <p>13 A Yes. So I may need you to clarify,</p> <p>14 though, what you're asking me.</p> <p>15 Q Like, I'm curious about, like,</p> <p>16 electronic documents. So, like, you know --</p> <p>17 like -- well, I don't know. What do you mean --</p> <p>18 A Sure.</p> <p>19 Q -- by in the FOIA -- like, when is</p> <p>20 something located in the FOIA office?</p> <p>21 A Sure. So in my office, we do not have</p> <p>22 access to the hundreds of IT systems that DEA</p> <p style="text-align: right;">Page 59</p>	<p>1 that a record's going to be located in the FOIA</p> <p>2 office and not made available to the public is</p> <p>3 the second time that document is requested?</p> <p>4 A I'm -- I'm sorry. I'm not following</p> <p>5 that one. You may have to ask the question</p> <p>6 again.</p> <p>7 Q Well, you've testified -- and correct</p> <p>8 me if I'm wrong. You've testified that the FOIA</p> <p>9 office doesn't have access to basically DEA writ</p> <p>10 large documents, true?</p> <p>11 A That is true.</p> <p>12 Q In fact, it has access to surprisingly</p> <p>13 few documents, fair?</p> <p>14 A We do not have access to the majority</p> <p>15 of records that are requested by the public. We</p> <p>16 have to rely on the owners, the offices that own</p> <p>17 those records to retrieve them for us, to provide</p> <p>18 them to us so that we can process them and</p> <p>19 release them to a requester.</p> <p>20 Q Well, when you say own the records,</p> <p>21 well, how does one part of DEA own a record that</p> <p>22 the other part of -- like where does this concept</p> <p style="text-align: right;">Page 61</p>

<p>1 of ownership come from?</p> <p>2 A So we have, for example, I believe</p> <p>3 somewhere around 150 different IT systems in DEA</p> <p>4 that hold records. If you work, let's say, in</p> <p>5 the Office of Diversion, you may have your own</p> <p>6 record systems. We are not experts in how those</p> <p>7 systems operate, or we would not even have the</p> <p>8 knowledge on how to obtain access to the records</p> <p>9 that are in those systems. There are hundreds of</p> <p>10 systems.</p> <p>11 So we have to again rely on the subject</p> <p>12 matter experts in DEA from the, you know,</p> <p>13 hundreds of offices that we have to locate what</p> <p>14 we're asking for. We send them a copy of the</p> <p>15 FOIA request and a search memo, and -- and we ask</p> <p>16 them to provide the material to us, responsive</p> <p>17 material to us.</p> <p>18 Q And that's not unusual, is it?</p> <p>19 A No. We do this every day.</p> <p>20 Q Right. So those aren't unusual</p> <p>21 circumstances. Those are the -- almost always</p> <p>22 the circumstances?</p> <p style="text-align: right;">Page 62</p>	<p>1 A -- personnel size, like --</p> <p>2 Q And I --</p> <p>3 A -- personnel --</p> <p>4 Q And just to be clear, sensitive to</p> <p>5 national security, I don't want to know, like,</p> <p>6 the location or anything. I just want to know,</p> <p>7 like, how big is it physically.</p> <p>8 A I don't know that I know the answer to</p> <p>9 how large it is, but I can tell you that right</p> <p>10 now, in terms of staff size, I have 18 employees.</p> <p>11 So there are 18 employees including myself right</p> <p>12 now. We have a large number of staff vacancies</p> <p>13 right now. I currently have 20 vacancies that</p> <p>14 I'm trying to get filled.</p> <p>15 Q Okay. And -- and to be clear, those</p> <p>16 employees, they have, like, physical, like,</p> <p>17 office locations, cubicles? Like, what is it</p> <p>18 that they --</p> <p>19 A Cubicles, or pods, as we call them.</p> <p>20 Q And they don't actually, like, keep</p> <p>21 stacks of, like, records in their offices, do</p> <p>22 they?</p> <p style="text-align: right;">Page 64</p>
<p>1 A Well --</p> <p>2 MR. RODRIGUEZ: Objection. Calls for</p> <p>3 legal conclusion, but you can answer.</p> <p>4 THE WITNESS: The only time we're going</p> <p>5 to assert unusual circumstances is if I have to</p> <p>6 go outside of my office, meaning I do not have</p> <p>7 access in my own records system.</p> <p>8 I utilize one system. It's called</p> <p>9 FOIAXpress. This houses everything from start to</p> <p>10 finish of every FOIA case. If I don't have</p> <p>11 access to those records in that system, I then</p> <p>12 have to go to the record custodian or the</p> <p>13 division that owns the material to get it.</p> <p>14 BY MR. ZORN</p> <p>15 Q And the only way you would have access</p> <p>16 to that record in FOIAXpress is if you've gotten</p> <p>17 that record previously?</p> <p>18 A That exact request and exact timeline</p> <p>19 previously.</p> <p>20 Q How physically big is your office?</p> <p>21 A Are you talking about like --</p> <p>22 Q I --</p> <p style="text-align: right;">Page 63</p>	<p>1 A No.</p> <p>2 Q So when you -- so the records in the</p> <p>3 FOIA office are almost exclusively the records in</p> <p>4 FOIAXpress, fair?</p> <p>5 A Correct.</p> <p>6 Q And I'm not trying to repeat, but I</p> <p>7 just -- the only time a record is in the FOIA</p> <p>8 office if it is in FOIAXpress, right?</p> <p>9 A Correct.</p> <p>10 Q And the only time a record is in</p> <p>11 FOIAXpress is if it's been previously requested?</p> <p>12 A Correct.</p> <p>13 Q And that's because the DEA FOIA office</p> <p>14 doesn't have access to any of the other systems</p> <p>15 in which DEA keeps documents, fair?</p> <p>16 A That is correct.</p> <p>17 Q Okay. Does -- you know, by any chance,</p> <p>18 do you know why the DEA FOIA office doesn't have</p> <p>19 access to these other systems?</p> <p>20 A I don't know if I can answer the</p> <p>21 question as to why, but I can tell you again, we</p> <p>22 are not the subject matter experts in all the</p> <p style="text-align: right;">Page 65</p>

<p>1 various things that DEA does.</p> <p>2 So if I had to, for example, go to the</p> <p>3 Office of Diversion to pull material -- I mean,</p> <p>4 we would have to become experts in all the</p> <p>5 various offices, their records systems. You</p> <p>6 know, we'd have to have a thorough understanding</p> <p>7 of the content of those records. That is just</p> <p>8 not feasible with a staff of 18. We -- we are</p> <p>9 struggling as it is to keep up with the sheer</p> <p>10 volume of FOIA requests that come to DEA, so we</p> <p>11 again have to really rely on the subject matter</p> <p>12 experts to provide what we are asking them to</p> <p>13 provide, you know, the material responsive to</p> <p>14 these FOIA requests.</p> <p>15 Q Would it -- would it help if the FOIA</p> <p>16 office were allocated more money?</p> <p>17 A Right now, what we need is staff. We</p> <p>18 need to fill our vacancies. I think our budget</p> <p>19 is fairly adequate. However, we are struggling</p> <p>20 right now with the lack of personnel resources.</p> <p>21 Q Well, everyone, DEA's hiring, so -- but</p> <p>22 back -- back to this. Okay.</p> <p style="text-align: right;">Page 66</p>	<p>1 the DEA Museum.</p> <p>2 Q Never been to the museum. Don't know</p> <p>3 what's in there.</p> <p>4 So -- so -- hold on. So -- okay. So</p> <p>5 Stacey -- what was --</p> <p>6 A Strayer.</p> <p>7 Q Strayer. And do you know where this</p> <p>8 understanding of unusual circumstances came from?</p> <p>9 A Well, it is captured in the DOJ FOIA</p> <p>10 regulations, which can be found at 28 -- excuse</p> <p>11 me -- 28 CFR part 16. It defines unusual</p> <p>12 circumstances.</p> <p>13 Q How does it define unusual</p> <p>14 circumstances?</p> <p>15 A There are three prongs to this. The</p> <p>16 first prong is the one that we primarily invoke</p> <p>17 at DEA, which is any time that we need to search</p> <p>18 for records that are physically outside of our</p> <p>19 own office, we would invoke unusual</p> <p>20 circumstances.</p> <p>21 For example, we have offices all over</p> <p>22 the country are, 200 and -- 239 offices across</p> <p style="text-align: right;">Page 68</p>
<p>1 So this understanding of unusual</p> <p>2 circumstances, was that in place when you became</p> <p>3 the chief FOIA officer --</p> <p>4 A Yes.</p> <p>5 Q -- in 2017?</p> <p>6 A Yes.</p> <p>7 Q And who was the chief before you?</p> <p>8 A It was a gentleman by the name of</p> <p>9 Stacey Strayer.</p> <p>10 Q All right. And how long have you been</p> <p>11 working in DEA FOIA?</p> <p>12 A In FOIA, since 2017.</p> <p>13 Q Didn't you work in records before that?</p> <p>14 A So -- yes. I used to be the section</p> <p>15 chief over FOIA, records management and</p> <p>16 investigative records.</p> <p>17 After I had been in this role for two</p> <p>18 years, I had -- I wrote a proposal asking upper</p> <p>19 management to split our section. I wanted to</p> <p>20 basically turn FOIA into a section with three</p> <p>21 units, which we did. And we hired someone else</p> <p>22 to run records, investigative records, and now</p> <p style="text-align: right;">Page 67</p>	<p>1 the United States that are part of 23 field</p> <p>2 divisions. We don't have access to their</p> <p>3 records. We have to rely on the owners to</p> <p>4 provide the material to us. So we primarily</p> <p>5 invoke it for the first prong.</p> <p>6 There are two other prongs, one being</p> <p>7 any time that we have to consult with other</p> <p>8 agencies that may have equities in the documents.</p> <p>9 That also would qualify under the unusual</p> <p>10 circumstances.</p> <p>11 Q Well, so -- and I want to break down</p> <p>12 your answer there because -- and you've read the</p> <p>13 FOIA statute, right?</p> <p>14 A Yes.</p> <p>15 Q It uses the word "establishments,"</p> <p>16 right?</p> <p>17 A Uh-huh.</p> <p>18 Q Like establishments separate from the</p> <p>19 office processing the request?</p> <p>20 A Yes.</p> <p>21 Q And it talks about field offices as</p> <p>22 well. So --</p> <p style="text-align: right;">Page 69</p>

<p>1 A Yes.</p> <p>2 Q -- different physical locations</p> <p>3 elsewhere in the country, that -- let's put that</p> <p>4 into one bucket. Do you follow me?</p> <p>5 A Yes.</p> <p>6 Q But as I understand what you're --</p> <p>7 where -- where is -- like what building is the</p> <p>8 DEA FOIA office in?</p> <p>9 A We're part of DEA headquarters in</p> <p>10 Arlington, Virginia.</p> <p>11 Q Okay. And there other DEA divisions</p> <p>12 that are physically in headquarters, right?</p> <p>13 A That is correct.</p> <p>14 Q And the way I understand what you're</p> <p>15 saying is that the agency interprets unusual</p> <p>16 circumstances to mean -- across the hallway is</p> <p>17 unusual circumstances if that's not the DEA FOIA</p> <p>18 office; is that fair?</p> <p>19 A Yes.</p> <p>20 Q Okay. So if I had a -- if I took my</p> <p>21 outline here and walked across the hallway and</p> <p>22 put it in someone else's office and that person</p> <p style="text-align: right;">Page 70</p>	<p>1 A It would apply. And if I could share</p> <p>2 one more example.</p> <p>3 Q Sure.</p> <p>4 A We have some offices that are part of</p> <p>5 headquarters that are not physically located in</p> <p>6 the same buildings as the FOIA office. They are</p> <p>7 located in other parts of Virginia.</p> <p>8 For example, our Information Technology</p> <p>9 Division. If I get a FOIA request specifically</p> <p>10 for e-mail records, I cannot access anyone's</p> <p>11 e-mail records. I have to rely on the</p> <p>12 Information Technology Division to do that</p> <p>13 search. They are physically located outside of</p> <p>14 headquarters in another part of Virginia. They</p> <p>15 are the office that would provide those</p> <p>16 responsive materials to us.</p> <p>17 Q Is that the Morrisette building?</p> <p>18 A No. That's -- that's actually our</p> <p>19 mailing address. So that's -- that's not</p> <p>20 where -- that's not our physical address.</p> <p>21 Q But that's a building that you're</p> <p>22 referring to in Northern Virginia?</p> <p style="text-align: right;">Page 72</p>
<p>1 worked in some other division, we're now in --</p> <p>2 in -- we're now outside the FOIA office, right?</p> <p>3 A Uh-huh. Correct.</p> <p>4 Q Okay. And that's like 10 feet away.</p> <p>5 A Correct.</p> <p>6 Q Is that fair?</p> <p>7 A Correct.</p> <p>8 Q Okay. So this is a game of inches,</p> <p>9 right?</p> <p>10 MR. RODRIGUEZ: Objection.</p> <p>11 Argumentative.</p> <p>12 MR. ZORN: Okay.</p> <p>13 MR. RODRIGUEZ: You can answer.</p> <p>14 MR. ZORN: No. I withdraw the</p> <p>15 question.</p> <p>16 BY MR. ZORN</p> <p>17 Q You -- any -- any time you venture --</p> <p>18 no matter how far outside the FOIA office one is,</p> <p>19 whether cyberspace or physically, if you are</p> <p>20 outside the FOIA office but in the same building,</p> <p>21 you're -- the unusual circumstances applies,</p> <p>22 according to the agency?</p> <p style="text-align: right;">Page 71</p>	<p>1 A It is a building in Northern Virginia.</p> <p>2 Q Right. That's like 30 minutes away</p> <p>3 from headquarters --</p> <p>4 A Uh-huh.</p> <p>5 Q -- or less, right?</p> <p>6 A But that is not where the Information</p> <p>7 Technology Division is located --</p> <p>8 Q Okay. Well --</p> <p>9 A -- no.</p> <p>10 Q -- we don't need to get into --</p> <p>11 A Right.</p> <p>12 Q -- specifically where it is, but it's</p> <p>13 in the same state, though, right?</p> <p>14 A In the same state.</p> <p>15 Q So -- but obtaining those records from</p> <p>16 the IT Division is -- is done over the Internet,</p> <p>17 true?</p> <p>18 A It is done through an electronic means.</p> <p>19 Q So no one's physically going down and,</p> <p>20 like, picking up, like, a box of records or even</p> <p>21 a USB drive, right?</p> <p>22 A Not for e-mail records, no.</p> <p style="text-align: right;">Page 73</p>

<p>1 Q Okay. So it's really, you know -- and</p> <p>2 maybe you can't answer this -- but it's not any</p> <p>3 more or less convenient than if it were in the</p> <p>4 same building, because it's transmitted the same</p> <p>5 way, right?</p> <p>6 A The process would be the same if they</p> <p>7 were physically located inside of our -- meaning</p> <p>8 a part of headquarters in Arlington.</p> <p>9 Q Right. So would you say that -- that</p> <p>10 invoking the unusual circumstances would be</p> <p>11 necessary to process a request that was</p> <p>12 electronically transmitted outside versus one</p> <p>13 that would be electronically processed inside?</p> <p>14 A Correct.</p> <p>15 Q There's no, like, additional cost or</p> <p>16 time based on where the documents are located if</p> <p>17 the transfer is going to be electronic; is that</p> <p>18 fair?</p> <p>19 A That's fair.</p> <p>20 Q But there is -- there is an access</p> <p>21 concern, and that's kind of what you've been</p> <p>22 testifying about, right? Like you personally --</p> <p style="text-align: right;">Page 74</p>	<p>1 A No, it was not.</p> <p>2 Q And maybe it just grew over time; fair?</p> <p>3 A I just want to make sure I'm following</p> <p>4 the line of questioning here.</p> <p>5 So if we're talking about the vast --</p> <p>6 like the sheer volume of record systems that are</p> <p>7 out there, yes, we do -- we do not -- I did not</p> <p>8 create that, right?</p> <p>9 Q Right.</p> <p>10 A But, again, I don't -- we do not -- the</p> <p>11 FOIA office does not have access to the material</p> <p>12 that is in all of those 150-plus systems.</p> <p>13 Q So do you happen to know when DEA</p> <p>14 adopted this interpretation of unusual</p> <p>15 circumstances?</p> <p>16 A We have been following this for --</p> <p>17 again, we follow the DOJ FOIA regulations. All</p> <p>18 of the components under DOJ are following the</p> <p>19 same regulations.</p> <p>20 So our interpretation and OIP's</p> <p>21 interpretation of the statute is that if we have</p> <p>22 to -- if we do not have access to the records, we</p> <p style="text-align: right;">Page 76</p>
<p>1 sorry. Let me -- let me just -- I'll just strike</p> <p>2 all that, and let me reask the question.</p> <p>3 Like you, Ms. Miller, can't access</p> <p>4 those records, right?</p> <p>5 A Correct.</p> <p>6 Q You need to reach out to another</p> <p>7 division within DEA to get access to the records,</p> <p>8 right?</p> <p>9 A Correct.</p> <p>10 Q And that necessarily takes additional</p> <p>11 time, right?</p> <p>12 A It takes time. It does.</p> <p>13 Q So there is a -- and you did not create</p> <p>14 that process, did you?</p> <p>15 A The search process?</p> <p>16 Q Well, just even the way this is</p> <p>17 structured. Like, that was in place when you got</p> <p>18 there.</p> <p>19 A That was in place when I arrived.</p> <p>20 Q Right. So -- and so that wasn't like a</p> <p>21 design choice that Ms. Kelleigh Miller made about</p> <p>22 the way DEA keeps its records, right?</p> <p style="text-align: right;">Page 75</p>	<p>1 have to go, you know, physically outside of our</p> <p>2 office to gain access to those records, we would</p> <p>3 invoke unusual circumstances.</p> <p>4 Q So this is not a DEA policy. It is a</p> <p>5 Department of Justice --</p> <p>6 A Department-wide.</p> <p>7 Q Okay. So this is -- the entire</p> <p>8 Department of Justice, it is its position that if</p> <p>9 a record is outside the FOIA office that unusual</p> <p>10 circumstances applies?</p> <p>11 A Correct.</p> <p>12 Q That's -- the United States Department</p> <p>13 of Justice is taking that -- that position under</p> <p>14 oath today in this -- this room?</p> <p>15 A We have consulted with OIP on this</p> <p>16 issue, and their position is that, yes, if it is</p> <p>17 outside of our own office -- again, we don't have</p> <p>18 access to the material. We have to rely on</p> <p>19 offices across DEA -- that unusual circumstances</p> <p>20 does apply.</p> <p>21 Q And, again, I'm not suggesting that</p> <p>22 anyone at DEA intentionally structured the office</p> <p style="text-align: right;">Page 77</p>

<p>1 BY MR. ZORN</p> <p>2 Q Okay. So -- so forgetting about how --</p> <p>3 how records are filed and just talking about</p> <p>4 records that have already been filed in these</p> <p>5 administrative proceedings, you say that those</p> <p>6 are kept in the ALJ offices; true?</p> <p>7 A Yes.</p> <p>8 Q And how does the public access those</p> <p>9 records?</p> <p>10 A They would have to file a FOIA request.</p> <p>11 Q And the only way a public -- a member</p> <p>12 of the public can get access to those records is</p> <p>13 by filing a FOIA request; true?</p> <p>14 A Yes, with the exception of things like</p> <p>15 the -- any decision or order by the</p> <p>16 administrative law judge is posted on DEA.gov, so</p> <p>17 that information is accessible to the public, but</p> <p>18 anything beyond that, we would -- they would have</p> <p>19 to submit a FOIA request to DEA for --</p> <p>20 Q So --</p> <p>21 A -- access.</p> <p>22 Q And we've established that these FOIA</p> <p style="text-align: right;">Page 86</p>	<p>1 will help my client -- I don't know -- escape</p> <p>2 charges from the DEA.</p> <p>3 Do you -- do you follow me?</p> <p>4 A Yes.</p> <p>5 Q Okay. I can't get those records any</p> <p>6 other way except through FOIA, right?</p> <p>7 A That is correct.</p> <p>8 Q But the likelihood I'm going to get</p> <p>9 that record before the hearing is slim, right?</p> <p>10 A Depending on, again, the volume and the</p> <p>11 complexity and what's being asked, I mean, it</p> <p>12 probably would be difficult to produce in 30</p> <p>13 days.</p> <p>14 Q In fact, it's almost -- are you</p> <p>15 familiar with how these administrative hearings</p> <p>16 work? If you're not, then --</p> <p>17 A I'm not an expert in this, no.</p> <p>18 Q Okay. Well, let's assume from a</p> <p>19 hypothetical that the administrative law judge</p> <p>20 requires each side to declare their evidence</p> <p>21 within 90 days of the hearing.</p> <p>22 Do you follow me?</p> <p style="text-align: right;">Page 88</p>
<p>1 requests -- that -- that request would</p> <p>2 necessarily raise unusual circumstances, true?</p> <p>3 A It would.</p> <p>4 Q So we're talking about more than 30</p> <p>5 days to deliver that request?</p> <p>6 A Yes.</p> <p>7 Q So I want to -- I want to kind of</p> <p>8 construct a hypothetical, and I'm going to ask if</p> <p>9 you follow me. I -- I represent client A.</p> <p>10 Do you follow me?</p> <p>11 A Uh-huh.</p> <p>12 Q I'm in a --</p> <p>13 A Yes.</p> <p>14 Q -- DEA administrative proceeding.</p> <p>15 Do you follow me?</p> <p>16 A Yes.</p> <p>17 Q The administrative law judge sets a</p> <p>18 timed hearing three months from now.</p> <p>19 Do you follow me?</p> <p>20 A Yes.</p> <p>21 Q And I believe that there is a useful</p> <p>22 record in a prior administrative proceeding that</p> <p style="text-align: right;">Page 87</p>	<p>1 A Uh-huh.</p> <p>2 Q So now we're talking a month and a half</p> <p>3 of getting -- getting records that I believe are</p> <p>4 going to exculpate my client.</p> <p>5 Do you follow my hypothetical?</p> <p>6 A Yes.</p> <p>7 Q There's -- there's almost no way that I</p> <p>8 can get any of those records from the ALJ's</p> <p>9 office, is there?</p> <p>10 A Not directly from the ALJ's office, no.</p> <p>11 Q No. And if I ask -- well, so I'd have</p> <p>12 to file a FOIA request with your office?</p> <p>13 A Yes.</p> <p>14 Q Your office is going to say there are</p> <p>15 unusual circumstances; true?</p> <p>16 A Uh-huh. Yes.</p> <p>17 Q And it's going to take more than 90</p> <p>18 days for me to get those records; true?</p> <p>19 A Yes. I would say it's definitely going</p> <p>20 to take more than 30 days.</p> <p>21 Q Okay. And you're going to -- if I'm</p> <p>22 representing a client that isn't the news media</p> <p style="text-align: right;">Page 89</p>

<p>1 was -- I gave this presentation publicly. So</p> <p>2 there's no reason for me to at that point, right,</p> <p>3 review and determine do I need to place</p> <p>4 exemptions. We released everything to you in</p> <p>5 full.</p> <p>6 Q Right. And so I'm saying, wouldn't</p> <p>7 that same process apply to documents filed</p> <p>8 publicly in an administrative proceeding?</p> <p>9 A Generally, yes, but, again, we'd have</p> <p>10 to identify -- we have to be able to identify</p> <p>11 which records have been publicly filed.</p> <p>12 Q And there's no -- there's no way to</p> <p>13 identify that?</p> <p>14 A It's part of the -- it's part of the</p> <p>15 review process, yes.</p> <p>16 Q And that's because the administrative</p> <p>17 law judge's office doesn't put any, like, marker</p> <p>18 on the documents, right?</p> <p>19 A I can't say a marker, but we probably</p> <p>20 would be having a conversation with them about</p> <p>21 which records were publicly filed. That would be</p> <p>22 part of that review process.</p> <p style="text-align: right;">Page 94</p>	<p>1 who's a judicial law clerk for ALJ Wallbaum,</p> <p>2 correct?</p> <p>3 A I spoke to Cotter?</p> <p>4 Q Sorry. Some FOIA -- the FOIA staff</p> <p>5 spoke to Ms. Cotter in response to one of my</p> <p>6 requests to discuss psilocybin, and she is a</p> <p>7 judicial law clerk in the ALJ's office for</p> <p>8 Ms. Wallbaum. If you don't recall now, we'll get</p> <p>9 the document out --</p> <p>10 A Yeah, I don't recall.</p> <p>11 Q -- and it will be -- it will be better</p> <p>12 to do it that way.</p> <p>13 But -- but more generally, your office</p> <p>14 will interface with the ALJ's office --</p> <p>15 A Yes.</p> <p>16 Q -- and then ask them if these were</p> <p>17 public or not. Is that a fair --</p> <p>18 A That is correct.</p> <p>19 Q And that's just -- if they had</p> <p>20 something on the document that said this was</p> <p>21 filed, you wouldn't need to do that --</p> <p>22 A Correct.</p> <p style="text-align: right;">Page 96</p>
<p>1 Q Has anyone ever just -- and you may not</p> <p>2 know this, but just in your personal knowledge,</p> <p>3 if Jimmy will give me the latitude, I mean, has</p> <p>4 anyone ever discussed, like, this issue with them</p> <p>5 of, like, the records that they keep in making</p> <p>6 filings, like, straightforward to request since</p> <p>7 the only way to get them is through FOIA?</p> <p>8 A Again, I'm not sure I'm following the</p> <p>9 question. I'm sorry.</p> <p>10 Q Well, it sounds like that the reason --</p> <p>11 and just correct me if I'm wrong -- the reason</p> <p>12 that your office needs to review these documents</p> <p>13 is because you can't look at the document on its</p> <p>14 face and determine if it was a public filing,</p> <p>15 right?</p> <p>16 A That is generally true, right. We need</p> <p>17 to rely on the -- again, the experts, the subject</p> <p>18 matter experts to tell us, has this been publicly</p> <p>19 filed.</p> <p>20 Q Right. And so I noticed in the</p> <p>21 notes -- and that's one of the documents I have</p> <p>22 selected today -- but you spoke to Ms. Cotter,</p> <p style="text-align: right;">Page 95</p>	<p>1 Q -- would you? Okay.</p> <p>2 So -- well, that answers that. Okay.</p> <p>3 So -- and there's no -- there's no</p> <p>4 electronic filing system that you're aware of for</p> <p>5 the DEA administrative proceedings, are there --</p> <p>6 is there?</p> <p>7 A I am not intimately familiar with their</p> <p>8 system, but I know they have an electronic system</p> <p>9 that they utilize that's fairly new, and they</p> <p>10 also maintain a large number of records at the</p> <p>11 Federal Records Center.</p> <p>12 So, oftentimes, when we're sending FOIA</p> <p>13 requests to their office, they have to pull those</p> <p>14 from the Federal Records Center for us, the paper</p> <p>15 files.</p> <p>16 Q Okay. And -- but are you aware of --</p> <p>17 there's no, like, electronic -- when you're</p> <p>18 talking about getting records, you're asking them</p> <p>19 to collect the records for you, right?</p> <p>20 A Correct.</p> <p>21 Q There's no way for you to log into any</p> <p>22 system and get the records for yourself, right?</p> <p style="text-align: right;">Page 97</p>

<p>1 A That is correct.</p> <p>2 Q And is there any -- any office within</p> <p>3 DEA that -- that -- that -- where you can just</p> <p>4 log in to some document system and get the</p> <p>5 documents for yourself?</p> <p>6 A We can in one circumstance, and this</p> <p>7 generally has to do with our investigative</p> <p>8 matters, which is somewhat sensitive, so I won't</p> <p>9 give a lot of detail. But my staff does have</p> <p>10 access to those, and we can generally handle</p> <p>11 certain types of requests for investigative</p> <p>12 matters quicker.</p> <p>13 Q Right. But there's no system where --</p> <p>14 well, okay. Let me -- let me then take a step</p> <p>15 back.</p> <p>16 Who -- when a FOIA request comes in and</p> <p>17 you need to go to another office -- do you follow</p> <p>18 me?</p> <p>19 A Yes.</p> <p>20 Q You reach out to that office. Is</p> <p>21 that --</p> <p>22 A We send them what we call a search memo</p> <p style="text-align: right;">Page 98</p>	<p>1 Q And potentially more complete, right?</p> <p>2 A Correct.</p> <p>3 Q In fact, you know, is there -- is there</p> <p>4 any agency mechanism to check to see if a</p> <p>5 records -- a custodian of records accurately gave</p> <p>6 you the -- the right set of records?</p> <p>7 A Well, this is exactly why my preference</p> <p>8 has been to go to the Information Technology</p> <p>9 Division. I do not -- as of now, I don't rely on</p> <p>10 the individual to pull their own records. I</p> <p>11 don't believe that it's -- it's as accurate.</p> <p>12 Q Yeah. And has that actually been the</p> <p>13 FOIA office's experience that it sometimes isn't</p> <p>14 accurate?</p> <p>15 A That has -- we have had some -- some</p> <p>16 issues, minor issues in the past with this.</p> <p>17 Q Has there ever -- I'm getting a little</p> <p>18 far afield here, but has there ever been an</p> <p>19 instance where the records were omitted without</p> <p>20 cause?</p> <p>21 A So I cannot think of a specific</p> <p>22 instance of this, but, again, I think if we allow</p> <p style="text-align: right;">Page 100</p>
<p>1 along with a copy of the request letter, and</p> <p>2 sometimes we, you know, even specifically tell</p> <p>3 them what we're looking for.</p> <p>4 Q Right. And then that office is the</p> <p>5 office that does the search for responsiveness.</p> <p>6 Is that fair?</p> <p>7 A Correct.</p> <p>8 Q Like, the FOIA office isn't the one</p> <p>9 that actually determines the initial set of what</p> <p>10 records are responsive?</p> <p>11 A Generally, no.</p> <p>12 Q So if I wanted Theresa Carbonaro's</p> <p>13 e-mails -- do you follow me?</p> <p>14 A Yes.</p> <p>15 Q Theresa Carbonaro's going to be the one</p> <p>16 searching her own e-mails, right?</p> <p>17 A Potentially, yes, but we will go to</p> <p>18 the -- generally, we will go to the office of --</p> <p>19 I'm sorry -- it's the Information Systems</p> <p>20 Division -- to have them do the e-mail search</p> <p>21 because we believe that the search would be more</p> <p>22 accurate if we let the IT experts do it.</p> <p style="text-align: right;">Page 99</p>	<p>1 a tool, an IT tool to do the work for us, it will</p> <p>2 be much more accurate than letting a human do it.</p> <p>3 Q Okay. But right now there is some --</p> <p>4 still some human element to this collection</p> <p>5 process, correct?</p> <p>6 A For things that are outside of e-mail.</p> <p>7 Q Okay. Where was I?</p> <p>8 MR. RODRIGUEZ: I think we were done.</p> <p>9 MR. ZORN: I'm learning -- I'm learning</p> <p>10 so much here. I was looking -- okay.</p> <p>11 BY MR. ZORN</p> <p>12 Q So -- so, you know, I do want to look</p> <p>13 here at Topic 3C. I believe A and B have been</p> <p>14 covered.</p> <p>15 A Pardon me.</p> <p>16 Q No, it's all good.</p> <p>17 A I just dropped something. I'll get it.</p> <p>18 MR. RODRIGUEZ: So I have a hard copy</p> <p>19 of the notice, and I'm going to let the witness</p> <p>20 look at it. I think it's just --</p> <p>21 MR. ZORN: I have no objection to that.</p> <p>22 THE WITNESS: Thank you.</p> <p style="text-align: right;">Page 101</p>

<p>1 BY MR. ZORN</p> <p>2 Q So the percentage or proportion of FOIA</p> <p>3 requests that were marked by DEA as raising</p> <p>4 unusual circumstances in 2020, 2021 and 2022,</p> <p>5 we're going to pull up the document, the FY</p> <p>6 documents that were produced, but I just want to</p> <p>7 be clear about my thinking in this, which is --</p> <p>8 so complex is not necessarily unusual</p> <p>9 circumstances?</p> <p>10 A Close proxy, but not necessarily,</p> <p>11 because, again, these definitions are very</p> <p>12 different.</p> <p>13 Q Okay. And let's just skip to D, then,</p> <p>14 which is -- so the only time a request isn't</p> <p>15 going to raise unusual circumstances is when that</p> <p>16 document is in the FOIAXpress?</p> <p>17 A That's one example, and then we have</p> <p>18 other types of requests.</p> <p>19 Like if we already know upon receipt of</p> <p>20 the request that we would not have access to</p> <p>21 that, or maybe a member of the public is asking</p> <p>22 for records that DEA simply does not maintain --</p> <p style="text-align: right;">Page 102</p>	<p>1 they will tell them that we are invoking unusual</p> <p>2 circumstances, and they tell them why, because we</p> <p>3 have to go outside of our own office.</p> <p>4 Q And it's a -- it's a totally binary</p> <p>5 determination in the sense that if it's one</p> <p>6 document somewhere else, it's the same as 100</p> <p>7 documents somewhere else, right? The --</p> <p>8 A Yes.</p> <p>9 Q The actual burden of -- of what's being</p> <p>10 requested is not evaluated except where the</p> <p>11 documents are, right?</p> <p>12 A Could you ask that again? I'm sorry.</p> <p>13 I want to make sure I'm following.</p> <p>14 Q Okay. So the -- the -- it's -- it</p> <p>15 doesn't -- the agency doesn't evaluate how</p> <p>16 burdensome it would be to produce records or,</p> <p>17 frankly, even just make a determination as to</p> <p>18 whether it will produce records. The only</p> <p>19 determination is: Where are the records?</p> <p>20 A No, that is not accurate. I think that</p> <p>21 we do -- we do consider how burdensome a request</p> <p>22 is.</p> <p style="text-align: right;">Page 104</p>
<p>1 that's one example -- we're not going to assert</p> <p>2 unusual circumstances. We're simply going to try</p> <p>3 to cut a letter and get it out to the requester</p> <p>4 as fast as possible to inform them that we don't</p> <p>5 have -- you know, we don't maintain records on</p> <p>6 this topic.</p> <p>7 Q And I've asked this question, but I</p> <p>8 think I want to drill down on it. So when is the</p> <p>9 unusual circumstances determination made?</p> <p>10 A When? It's made -- so when a request</p> <p>11 comes in through our intake unit -- intake</p> <p>12 handles that -- you know, that -- the beginning,</p> <p>13 basically, the initial process of reviewing a</p> <p>14 request, determining that, you know, we're ready</p> <p>15 to move forward with a search.</p> <p>16 So they're -- if they determine that we</p> <p>17 have to go outside of our own office -- we don't</p> <p>18 have access to those records in our system -- we</p> <p>19 then -- they will invoke the unusual</p> <p>20 circumstances.</p> <p>21 So they send an acknowledgment e-mail</p> <p>22 to the requester, and within that acknowledgment,</p> <p style="text-align: right;">Page 103</p>	<p>1 And I'll -- just to share an example,</p> <p>2 we use what we call multi-track processing. So</p> <p>3 let's say we've invoked unusual circumstances.</p> <p>4 We've collected the records. We will designate</p> <p>5 requests based on, basically, three categories,</p> <p>6 whether it's simple, complex or expedited. So if</p> <p>7 something has been granted expedited treatment,</p> <p>8 we have to prioritize those. We're generally</p> <p>9 working to get these requests completed first,</p> <p>10 right?</p> <p>11 Q Sure.</p> <p>12 A Requests are generally handled in a</p> <p>13 first-in, first-out basis based on the queue that</p> <p>14 we've placed them in, but simple requests, I</p> <p>15 mean, I do not want to have a one or two-page</p> <p>16 response sitting in a queue for a year, right?</p> <p>17 That is not helpful to the public.</p> <p>18 So we have set up particular buckets or</p> <p>19 queues, if you will, so that the management team</p> <p>20 and I can keep eyes on these and we can get these</p> <p>21 out faster. So even if we had to invoke unusual</p> <p>22 circumstances and I get two pages back from the</p> <p style="text-align: right;">Page 105</p>

<p>1 field, it's going in a queue so that I know I 2 need to get these out. These are -- these are 3 small cases. We don't want to be hanging on to 4 those.</p> <p>5 Q So two pages from the field, that's 6 unusual circumstances?</p> <p>7 A It would be, because, again, we don't 8 have access to the system the material is housed, 9 and we need to rely on them to provide it to us 10 for processing.</p> <p>11 Q And we can agree that the unusual 12 circumstances determination isn't about searching 13 or collecting records. It's about whether or not 14 the agency will produce records, right?</p> <p>15 A I don't think that's accurate, no.</p> <p>16 Q Well, there's -- there's -- there are 17 different parts of the FOIA process. There's the 18 determination at the beginning of whether or not 19 the agency is going to search and collect 20 records, right?</p> <p>21 A So that would happen at the intake 22 stage.</p> <p style="text-align: right;">Page 106</p>	<p>1 that in consultation with the OIP that -- when 2 DEA invokes unusual circumstances.</p> <p>3 I understand you -- you strongly 4 disagree whether that's appropriate under the 5 statute, but I think that we're --</p> <p>6 MR. ZORN: Well, I'm --</p> <p>7 MR. RODRIGUEZ: I don't want -- I don't 8 want you to try to get her to concede a legal 9 point.</p> <p>10 MR. ZORN: I'm not asking a legal 11 question here. I'm trying to use the statute to 12 illustrate what exactly is being deferred when 13 the unusual circumstances is being invoked.</p> <p>14 BY MR. ZORN</p> <p>15 Q And, like, it's the -- it's like a 16 determination on the FOIA request, right? It's 17 not the actual production of records.</p> <p>18 In other words --</p> <p>19 A It's not the actual production. It's 20 simply the fact that I have to go search for 21 those records --</p> <p>22 Q Right.</p> <p style="text-align: right;">Page 108</p>
<p>1 Q Right.</p> <p>2 A We receive a request. The staff has 3 reviewed the request thoroughly, and they 4 determine it's time to conduct a search. So we 5 send a search memo out to whichever office would 6 own the material being requested.</p> <p>7 Q Right.</p> <p>8 A And that's the first process -- the 9 first step.</p> <p>10 Q Right. And -- but -- but -- sorry. 11 I'm cutting you off. That's rude.</p> <p>12 A No, you're fine.</p> <p>13 Q Okay. I just -- I want to go to, like, 14 in the statute what the unusual circumstance 15 is -- and I don't know what if you want to pull 16 the statute up. That was -- it was, what, 17 Exhibit FOIA?</p> <p>18 A Uh-huh.</p> <p>19 MR. RODRIGUEZ: I'm going to object 20 probably that you're asking for a legal 21 conclusion. I think we've established what the 22 DEA's practice is and that she's testified</p> <p style="text-align: right;">Page 107</p>	<p>1 A -- outside of my own office. Once 2 those records are collected, it then moves on to 3 a different unit.</p> <p>4 The processing unit is now reviewing 5 for responsiveness, determining what's 6 releasable, you know, to the requester under the 7 FOIA, placing redactions on records. So that's 8 what that team does.</p> <p>9 But intake is doing the initial -- you 10 know, they're the ones that are invoking unusual 11 circumstances, if that's what you're asking.</p> <p>12 Q Yeah, and -- but I'm saying what -- 13 what is the -- what timeline here is getting 14 extended?</p> <p>15 It's not like -- the agency, whether 16 unusual circumstances apply or not, can frankly 17 take its time reviewing records and producing 18 records. What's being extended when the 19 exception is invoked is the determination on, 20 okay, here's how much you need to pay me to get 21 me to search -- sorry -- to get me to review 22 these records, right?</p> <p style="text-align: right;">Page 109</p>

<p>1 A This is the DEA's FOIA and Privacy Act 2 policy, internal policy. 3 Q So this is -- this is an internal 4 policy of DEA, true? 5 A Yes. 6 Q Okay. And at the top of the first 7 page, it says: This document and its contents 8 are the property of the Drug Enforcement 9 Administration and may not be disseminated 10 outside DEA (or if loaned outside of DEA, further 11 disseminated) without the express written 12 permission of the Office of Chief FOIA counsel. 13 Did I read that correctly? 14 A My -- the last little bit there, Office 15 of Chief Counsel, yes. Yeah. 16 Q And so what's -- what's the purpose 17 of -- well, let me take a step back. 18 Is this the complete document, or is 19 this a chapter in a larger document? 20 A This is a policy that can be found in 21 our administrative manual. So it's a -- it's a 22 subsection, if you will, of the admin manual.</p> <p style="text-align: right;">Page 114</p>	<p>1 A Yes. 2 Q Do you know where this document is 3 published? 4 A When? 5 Q Where? 6 A Oh, where. I'm sorry. This is 7 published in the administrative manual, which is 8 accessible to all agency staff. 9 Q Okay. Is it accessible to the public? 10 A It is not. 11 Q Okay. And you're familiar with the 12 FOIA statute, aren't you? 13 A Yes. 14 Q Should this be accessible to the 15 public? 16 A It should be, and it is definitely part 17 of our list of priorities and things that we 18 would like to get published. 19 Due to the lack of resources I have 20 right now and our primary focus being just able 21 to fulfill FOIA requests, we've had struggle 22 getting policies and other things posted, but it</p> <p style="text-align: right;">Page 116</p>
<p>1 Q Okay. And have you read that admin 2 manual before? 3 A Yes. 4 Q Okay. And is this header across the 5 entire manual? 6 A It's across all manuals -- 7 Q Okay. 8 A -- in DEA. 9 Q Okay. And are those manuals that 10 instruct staff members on how to carry out their 11 jobs and duties? 12 A That is correct. 13 Q Okay. And you would agree that this 14 portion of the manual relates to FOIA requests 15 and processing of FOIA requests, correct? 16 A That is correct. 17 Q And, inherently, a FOIA request is 18 responding to a request made by a member of the 19 public, true? 20 A True. 21 Q And so responding to FOIA requests 22 affect the public, right?</p> <p style="text-align: right;">Page 115</p>	<p>1 is definitely a goal of ours. 2 Q Okay. So disseminating this particular 3 chapter outside of DEA shouldn't raise any agency 4 concerns, right? 5 A In my opinion, it should not. 6 Q Okay. Because it's not a confidential 7 document because the FOIA presumably makes it 8 public, right? 9 A If this were to be requested by the 10 public, we would produce it. Second to that, 11 like I mentioned, my goal would be to eventually 12 publish this and other administrative policies 13 online. 14 Q And that would be a simple request now. 15 Because of my litigation, it's in the FOIAXpress 16 database, right? 17 A Are you saying if I were to get a 18 request for this right now, I would consider it 19 simple? 20 Q Yes. 21 A So how we define simple and complex, 22 again, right --</p> <p style="text-align: right;">Page 117</p>

<p>1 Q And let me qualify this by -- like if 2 you discussed with, like, an attorney, I don't 3 want to run into privilege issues. I'm really 4 more talking about, like, chief FOIA officer 5 counsel type discussions. So --</p> <p>6 A Yes.</p> <p>7 Q -- like, has this ever been discussed 8 in, like, meetings sort of at DOJ?</p> <p>9 A If you're talking about the definition 10 of unusual circumstances, yes, I have discussed 11 this with an attorney at OIP.</p> <p>12 Q And I don't -- I can't ask you about 13 the contents of those discussions, so I won't, 14 but you have -- this has been discussed?</p> <p>15 A It has been discussed.</p> <p>16 Q Was it -- and now I'm just asking when. 17 Was it discussed before or after I filed this 18 lawsuit?</p> <p>19 A After.</p> <p>20 Q Okay. And so you have been in touch 21 with OIP since I filed this lawsuit?</p> <p>22 A Yes, I have.</p> <p style="text-align: right;">Page 122</p>	<p>1 A Yes. Their interpretation is the same 2 as mine.</p> <p>3 Q Okay. Let's move on to something else.</p> <p>4 MR. RODRIGUEZ: And to be clear so -- I 5 think it will head off maybe any future issue. 6 It was a communication with an attorney at OIP, 7 and so we would consider the details of the 8 communication to be privileged. I just didn't 9 want you to turn around and ask me like, where is 10 that? It exists.</p> <p>11 MR. ZORN: Yeah.</p> <p>12 MR. RODRIGUEZ: It was via e-mail, or 13 at least I've seen an e-mail.</p> <p>14 MR. ZORN: I think it's -- I think it's 15 privileged, so I'm not --</p> <p>16 MR. RODRIGUEZ: Okay.</p> <p>17 MR. ZORN: From what I've heard, it 18 sounds --</p> <p>19 MR. RODRIGUEZ: Yeah. There's no 20 issue.</p> <p>21 MR. ZORN: -- sounds privileged, and 22 I'm not -- I'm not going to go into the contents</p> <p style="text-align: right;">Page 124</p>
<p>1 Q Okay. And so OIP is aware of this 2 lawsuit?</p> <p>3 A I have informed them that -- I'm trying 4 to remember how the conversation started.</p> <p>5 I was -- I went to them to get clarity 6 on the definition of unusual circumstances. I 7 wanted to make sure that our interpretation was 8 the department's interpretation. So that was 9 the -- so I reached out to them, obviously, after 10 the lawsuit was filed to get clarification on 11 this.</p> <p>12 Q Oh, so, I mean, you're here 13 representing the Department of Justice, and the 14 Office of Information Policy has confirmed that 15 this is the Department of Justice --</p> <p>16 A Yes.</p> <p>17 Q -- policy?</p> <p>18 And by "this," I mean the 19 interpretation --</p> <p>20 A The --</p> <p>21 Q -- we've been discussing of unusual 22 circumstances.</p> <p style="text-align: right;">Page 123</p>	<p>1 of it. There might be some argument under FOIA 2 that it isn't, but I'm not -- I'm not going to go 3 there.</p> <p>4 BY MR. ZORN</p> <p>5 Q Okay. Why don't -- why don't we talk a 6 little bit about fees. I'm interested in how 7 fees are calculated.</p> <p>8 So I'll start with that, which is just 9 an open ended: How are fees calculated?</p> <p>10 A We, like I mentioned earlier, do not 11 charge search fees any longer. It's very rare 12 for us to charge search fees due to the statutory 13 time limits.</p> <p>14 Review fees, however, are charged only 15 to commercial use requesters. So when we receive 16 a request and we've determined that it is, in 17 fact, commercial use, we will continue to -- we 18 will do the search, collect the records.</p> <p>19 Once the records come back, we -- the 20 staff has a little calculation that we file to 21 determine how long the review time is going to 22 take, you know, what the labor hours are going to</p> <p style="text-align: right;">Page 125</p>

<p>1 be, and then we follow the fee provision that's</p> <p>2 in the DOJ FOIA regulations, which says that we</p> <p>3 charge \$40 per hour.</p> <p>4 MR. ZORN: Okay. And so I've</p> <p>5 introduced an exhibit. It's annotated, and</p> <p>6 it's -- it should be in the folder as 10A.</p> <p>7 THE WITNESS: Okay.</p> <p>8 MR. ZORN: And we can pull this up.</p> <p>9 (Deposition Exhibit Number 10A</p> <p>10 was marked for identification.)</p> <p>11 BY MR. ZORN</p> <p>12 Q When you have this up, just let me</p> <p>13 know.</p> <p>14 A Yes, I do.</p> <p>15 Q So this is -- and there's highlighting</p> <p>16 on the page, and I just want to be clear for the</p> <p>17 record. It wasn't produced to me with the</p> <p>18 highlighting. That's highlighting I've done to</p> <p>19 help us sort of be clear on the questioning.</p> <p>20 But at the top, it's "22-00585-F</p> <p>21 Request Notes."</p> <p>22 Is that -- did I read that correctly?</p> <p style="text-align: right;">Page 126</p>	<p>1 how we're calculating review fees, because I had</p> <p>2 noticed some variability between teams in how the</p> <p>3 staff and supervisors were calculating what they</p> <p>4 believed, you know, in good faith, was -- how</p> <p>5 long it was going to take them to complete a</p> <p>6 review. So I wanted to standardize this.</p> <p>7 So we drafted an SOP, and I had several</p> <p>8 meetings with the unit chiefs to sit down -- we</p> <p>9 sat down in a room and worked together in</p> <p>10 determining how long on average does it take you</p> <p>11 to review a page, place redactions on a page, and</p> <p>12 we came up with seven minutes on average.</p> <p>13 Q And what's an SOP?</p> <p>14 A I'm sorry. Standard operating</p> <p>15 procedures.</p> <p>16 Q Okay.</p> <p>17 A So we wanted to put a guidance document</p> <p>18 together for the office in an effort to</p> <p>19 standardize this process and be more transparent</p> <p>20 and be consistent in how we're calculating review</p> <p>21 fees.</p> <p>22 Q And -- and is that -- was that</p> <p style="text-align: right;">Page 128</p>
<p>1 A Yes.</p> <p>2 Q And is it a fair characterization to</p> <p>3 say that these are internal DEA request notes</p> <p>4 from a request that I filed?</p> <p>5 A Correct.</p> <p>6 Q Okay. And looking at the first page,</p> <p>7 I've highlighted that there's 2,190 pages of</p> <p>8 potentially responsive records.</p> <p>9 Did I --</p> <p>10 A Correct.</p> <p>11 Q Okay. And then -- and this isn't</p> <p>12 highlighted, but it's on the next line -- seven</p> <p>13 minutes per page for review.</p> <p>14 Is that the standard agency seven</p> <p>15 minutes per page?</p> <p>16 A That is what our office has -- uses,</p> <p>17 yes, for the determination of the review time.</p> <p>18 Q Where did that number come from?</p> <p>19 A So that number came from a series of --</p> <p>20 let me back up.</p> <p>21 During 20 -- early 2022, I determined</p> <p>22 there was a need to standardize this process in</p> <p style="text-align: right;">Page 127</p>	<p>1 produced --</p> <p>2 A Yes.</p> <p>3 Q -- the SOP?</p> <p>4 A It was.</p> <p>5 Q Okay. Was it titled standard</p> <p>6 operating -- did I miss it?</p> <p>7 A It was, and it was titled "Calculating</p> <p>8 of Review Fees."</p> <p>9 Q Okay. So the seven minutes comes from</p> <p>10 just -- was there any, like -- who -- was it --</p> <p>11 how was seven minutes arrived at? Just a guess</p> <p>12 of what the average time was?</p> <p>13 A It was myself and three other managers,</p> <p>14 yes, that sat together and talked through this</p> <p>15 SOP, and we came up with, on average, that we</p> <p>16 believe it takes us about seven minutes to</p> <p>17 process a page, meaning I'm reviewing a page, I'm</p> <p>18 using a tool to place redactions, place codes on</p> <p>19 the document. It's about seven minutes per page.</p> <p>20 Q Okay. And then -- and you're not --</p> <p>21 so -- so the estimate's not based on what -- how</p> <p>22 long it would take to actually read a page. It's</p> <p style="text-align: right;">Page 129</p>

<p>1 just --</p> <p>2 A Oh, it's reading as well, yeah. I'm</p> <p>3 reading the page, and I'm placing redactions on</p> <p>4 protected information and asserting the exemption</p> <p>5 code, placing the exemption code on the document.</p> <p>6 That's all part of the --</p> <p>7 Q And so I'm still kind of at a loss. So</p> <p>8 how -- you guys just agreed on seven minutes? I</p> <p>9 don't --</p> <p>10 A Yes.</p> <p>11 Q Was there any -- did you kind of like</p> <p>12 do any experiments or --</p> <p>13 A We did not do an experiment, per se,</p> <p>14 no. This was a conversation over several</p> <p>15 meetings, you know, in putting this SOP together,</p> <p>16 and just from our -- our experience and years of</p> <p>17 practice in this area, we came up with the seven</p> <p>18 minutes.</p> <p>19 Q Because the difference between seven</p> <p>20 minutes and six minutes is a lot -- it's a lot of</p> <p>21 money when you multiply it by a lot of pages.</p> <p>22 A And, again, that's why, you know, it is</p> <p style="text-align: right;">Page 130</p>	<p>1 A Correct.</p> <p>2 Q Why are there two levels of review?</p> <p>3 A So our subordinate staff does the</p> <p>4 majority of the processing. We have to -- it has</p> <p>5 to be reviewed by a manager before we can</p> <p>6 authorize release to the public, right?</p> <p>7 Oftentimes, the managers, when they're</p> <p>8 doing final review, myself included, are making</p> <p>9 slight adjustments to those records. Obviously,</p> <p>10 if it's a lot of adjustments, it's going back to</p> <p>11 the processor to finalize.</p> <p>12 But, generally, a manager is tweaking</p> <p>13 redactions, making sure that this has been</p> <p>14 properly processed, that the redaction codes are</p> <p>15 proper. If -- if something was incorrectly</p> <p>16 redacted, we're lifting redactions. So the</p> <p>17 manager is doing review work and also sometimes</p> <p>18 minor corrections.</p> <p>19 Q And why is the manager 20 percent?</p> <p>20 A Because we're not doing the full</p> <p>21 processing that the subordinate staff is doing,</p> <p>22 right? We're not going -- we're not placing</p> <p style="text-align: right;">Page 132</p>
<p>1 an estimate. You know, this -- this fee, it's an</p> <p>2 estimate. So we estimate that it takes, on</p> <p>3 average, seven minutes.</p> <p>4 Q And three -- so three people came up</p> <p>5 with this?</p> <p>6 A I think four of us. There were --</p> <p>7 Q Four.</p> <p>8 A -- four of us.</p> <p>9 Q Okay. And so there are multiple layers</p> <p>10 of review as well, true?</p> <p>11 A Generally, it's two. So it would be</p> <p>12 the individual in our office that we assign to</p> <p>13 process the case. Then when that individual is</p> <p>14 finished with the case, it moves up to a manager</p> <p>15 for review.</p> <p>16 So we are assessing the review fee for</p> <p>17 both the professional administrative staff's time</p> <p>18 and the supervisor time.</p> <p>19 Q Okay. And -- and looking at the</p> <p>20 document here, the management review time is</p> <p>21 estimated to be 20 percent less than the -- than</p> <p>22 the initial reviewer's time; is that fair?</p> <p style="text-align: right;">Page 131</p>	<p>1 redactions on the entire document. That's</p> <p>2 already been done.</p> <p>3 When it gets to our level, we're just</p> <p>4 going through the document, reading every page,</p> <p>5 making sure that the redactions are correct, and</p> <p>6 making adjustments if need be.</p> <p>7 Q If a manager has to review everything,</p> <p>8 why even have the initial review?</p> <p>9 A Because we would then have to place all</p> <p>10 the redactions, all the exemption codes. It is a</p> <p>11 lot of work. So we have subordinate staff to do</p> <p>12 that initial processing for us. We're just final</p> <p>13 review. We're just making sure that it's been</p> <p>14 properly redacted and it's ready for release to</p> <p>15 the public.</p> <p>16 Q But you're charging for -- the agency</p> <p>17 charges \$40 per hour of -- of both the initial</p> <p>18 review and the manager review?</p> <p>19 A That is correct.</p> <p>20 Q And the purpose of the initial review</p> <p>21 is to save that 20 percent that's going to happen</p> <p>22 with the manager review; is that fair?</p> <p style="text-align: right;">Page 133</p>

<p>1 we call stop the clock.</p> <p>2 So if a request is not perfected,</p> <p>3 meaning there's an issue with the request and we</p> <p>4 have to go back to requester, we stop the clock</p> <p>5 because we don't want that counting towards</p> <p>6 the -- you know, the statutory deadlines. And</p> <p>7 once, again, we've perfected the request, we --</p> <p>8 we basically turn the clock back on, if you will.</p> <p>9 Q Okay. Then to track, we've discussed</p> <p>10 that?</p> <p>11 A Uh-huh.</p> <p>12 Q And so there are three tracks, right?</p> <p>13 There's -- there's complex, expedited and simple?</p> <p>14 A Correct.</p> <p>15 Q Okay. What is the expedited track?</p> <p>16 A Expedited track is any time a requester</p> <p>17 requests expedited treatment and because they</p> <p>18 feel there is a compelling need for the</p> <p>19 information sought.</p> <p>20 So there is some criteria, obviously,</p> <p>21 that has to be met in order to meet the</p> <p>22 compelling needs standard. One example would be</p> <p style="text-align: right;">Page 162</p>	<p>1 years' worth of FOIA requests ahead of anything</p> <p>2 that gets filed now?</p> <p>3 A I'm sorry. I want to make sure I'm not</p> <p>4 losing track of the question here. So I've moved</p> <p>5 away. I'm at the -- I'm now at the top row.</p> <p>6 Are you asking about a specific --</p> <p>7 Q I'm just --</p> <p>8 A -- entry or no? Just generally --</p> <p>9 Q No, just --</p> <p>10 A -- you're asking --</p> <p>11 Q -- generally. We did look -- we looked</p> <p>12 at an entry, right, that was unfulfilled from</p> <p>13 April of 2018, true?</p> <p>14 A Yes.</p> <p>15 Q And DEA processes FOIA requests on a</p> <p>16 first-in, first-out type basis?</p> <p>17 A Uh-huh.</p> <p>18 Q Fair?</p> <p>19 A Yes.</p> <p>20 Q And that one is still being reviewed,</p> <p>21 presumably, true?</p> <p>22 A The one that we looked at had to do</p> <p style="text-align: right;">Page 164</p>
<p>1 maybe an inmate on death row has asked for</p> <p>2 records on themselves, and, you know, we would</p> <p>3 grant expedited treatment in that scenario.</p> <p>4 Q Okay. And who makes the determination</p> <p>5 to grant expedited treatment?</p> <p>6 A Generally, our intake unit.</p> <p>7 Q Okay. And is -- is a journalist making</p> <p>8 a request for information -- is that given</p> <p>9 expedited treatment?</p> <p>10 A They would -- we would consider the</p> <p>11 request. If they ask for expedited treatment, of</p> <p>12 course, we would consider the request. It's --</p> <p>13 it's incumbent upon the requester to basically</p> <p>14 tell us which standard under expedited treatment</p> <p>15 they feel that they meet.</p> <p>16 Q Okay. And, otherwise, the requests are</p> <p>17 prioritized on a first-in, first-out type basis?</p> <p>18 A Generally, yes.</p> <p>19 Q So we're looking at the spreadsheet.</p> <p>20 We looked at this April 2018 request.</p> <p>21 That is -- that is still being</p> <p>22 processed, so there's -- there's more than four</p> <p style="text-align: right;">Page 163</p>	<p>1 with antitrust, so if -- but if you're asking</p> <p>2 about a DEA request that's from 2018 that's still</p> <p>3 open, I mean, we definitely have some requests</p> <p>4 from 2018, 2019, that are open.</p> <p>5 Q Okay. And so -- so -- well, I'm</p> <p>6 looking -- I'm looking now at the -- I don't know</p> <p>7 if it was antitrust. I mean, 18-00710 is -- I</p> <p>8 have it as a DEA request.</p> <p>9 A Okay. Sorry. We moved away from the</p> <p>10 line that you were asking about. That's why</p> <p>11 we're back at the top now.</p> <p>12 Q Yeah. Sorry.</p> <p>13 A I think it was, what, 17 --</p> <p>14 Q Yeah. If you get to the 116166 area,</p> <p>15 yeah, we have a number of requests from 2018 that</p> <p>16 are -- are empty.</p> <p>17 And I'll -- when you tell me when</p> <p>18 you're there, I'll give you a precise question</p> <p>19 and answer.</p> <p>20 A Could you kindly give me the number</p> <p>21 again?</p> <p>22 Q Sure. It's the Excel row 16167.</p> <p style="text-align: right;">Page 165</p>

<p>1 A Actually, just give me a minute. Just</p> <p>2 looking for the data. I'm trying to get this not</p> <p>3 to move so fast.</p> <p>4 MR. RODRIGUEZ: Yeah. My --</p> <p>5 THE WITNESS: It's difficult.</p> <p>6 MR. RODRIGUEZ: The interface --</p> <p>7 THE WITNESS: I'm sorry.</p> <p>8 MR. RODRIGUEZ: -- is very jumpy on my</p> <p>9 pad. I don't usually use that. And I brought a</p> <p>10 mouse --</p> <p>11 THE WITNESS: That's okay.</p> <p>12 MR. RODRIGUEZ: -- but for whatever</p> <p>13 reason, it's not working.</p> <p>14 THE WITNESS: 161 --</p> <p>15 MR. ZORN: 16167.</p> <p>16 THE WITNESS: 67. All right. I'm</p> <p>17 almost there. There we go. All right.</p> <p>18 BY MR. ZORN</p> <p>19 Q So this is a DEA request?</p> <p>20 A Correct.</p> <p>21 Q It is 18-00710. True?</p> <p>22 A Yes.</p> <p style="text-align: right;">Page 166</p>	<p>1 these requests in line, right?</p> <p>2 A Typically, yes. But having said that,</p> <p>3 I have set up a number of queues in the office to</p> <p>4 try to flag or keep eyes on things that are</p> <p>5 simple.</p> <p>6 So if I have a request from 2018 and</p> <p>7 it's two pages, we shouldn't have that, right?</p> <p>8 We want to make sure that we're getting requests</p> <p>9 out that are simple quicker. And by doing so,</p> <p>10 we've actually reduced our simple case processing</p> <p>11 time about 52 percent in the last two years.</p> <p>12 Complex is definitely far more</p> <p>13 challenging, and it's because it involves</p> <p>14 hundreds, sometimes thousands of pages of records</p> <p>15 to review, and, again, we have a very small team</p> <p>16 to process this. So we do have a backlog.</p> <p>17 Q And so anyone who makes -- well, what's</p> <p>18 the threshold between simple and complex</p> <p>19 page-wise?</p> <p>20 A Approximately 20 pages. So we said</p> <p>21 anything that's 20 pages and less, we dump into</p> <p>22 one particular queue. That just really helps the</p> <p style="text-align: right;">Page 168</p>
<p>1 Q And it's a FOIA request, dash F?</p> <p>2 A Yes.</p> <p>3 Q Okay. And -- and just moving to the</p> <p>4 right, it's opened May 2018 and perfected that</p> <p>5 same day, right?</p> <p>6 A Yes.</p> <p>7 Q And it's still open, right?</p> <p>8 A It's still open.</p> <p>9 Q And with your screen there, you know,</p> <p>10 looking down the page, you can see there are --</p> <p>11 A Yes.</p> <p>12 Q -- like almost a dozen requests from</p> <p>13 2018 that are still open.</p> <p>14 A Correct.</p> <p>15 Q And they're complex, so the volume is</p> <p>16 probably more than -- than -- than a simple</p> <p>17 request?</p> <p>18 A Right.</p> <p>19 Q And these are all still open?</p> <p>20 A Yes.</p> <p>21 Q And so in the first-in, first-out</p> <p>22 system, unless a request is expedited, it's after</p> <p style="text-align: right;">Page 167</p>	<p>1 management team keep eyes on those so we can work</p> <p>2 together to close them faster.</p> <p>3 Q So -- and are requests ever batched</p> <p>4 together?</p> <p>5 So if I make two requests for two</p> <p>6 documents, will that be treated -- would that be</p> <p>7 treated -- let's say the documents I request are</p> <p>8 ten apiece. Do you follow me?</p> <p>9 A Okay.</p> <p>10 Q Well, actually, no. 15 apiece.</p> <p>11 A Okay.</p> <p>12 Q If I were to batch that together, there</p> <p>13 would be 30 pages, and that would be complex,</p> <p>14 right?</p> <p>15 A So -- but you -- well, you have filed</p> <p>16 them as two separate requests, and they were --</p> <p>17 Q I filed --</p> <p>18 A -- 15 pages each, so we would -- when</p> <p>19 we're done with the processing, we would put</p> <p>20 those into one of the simple queues I spoke of.</p> <p>21 That way, again, we're keeping eyes on those, and</p> <p>22 we're trying to get them out faster to you.</p> <p style="text-align: right;">Page 169</p>

<p>1 MR. ZORN: Yeah.</p> <p>2 THE WITNESS: Thank you.</p> <p>3 BY MR. ZORN</p> <p>4 Q Okay. So -- and the agency doesn't</p> <p>5 have a benchmark sort of aiming to have a certain</p> <p>6 percentage of simple versus complex, does it?</p> <p>7 A No. And I guess I'm struggling with</p> <p>8 this because, like, I don't know how we can get</p> <p>9 around a case that is legitimately -- it's</p> <p>10 complex.</p> <p>11 If I am -- if my staff has to process</p> <p>12 hundreds, sometimes thousands of pages, the only</p> <p>13 workaround to reduce that -- the size of that</p> <p>14 case would be to have a conversation with the</p> <p>15 requester and see if we could narrow scope.</p> <p>16 Q I follow you, and you're talking about</p> <p>17 thousands of pages, but I guess what -- what I'm</p> <p>18 kind of getting at is -- okay. And you've said</p> <p>19 it's not a hard and fast rule, and I accept that.</p> <p>20 But if the threshold for what sort of</p> <p>21 crosses into complex or simple were raised, you</p> <p>22 know, potentially, there would be a different</p> <p style="text-align: right;">Page 186</p>	<p>1 the number of pages, the length of time it's</p> <p>2 going to take us to process.</p> <p>3 You know, low staffing numbers also</p> <p>4 impact this, right? It just -- the ability to</p> <p>5 produce something quickly nowadays with such</p> <p>6 limited resources is difficult.</p> <p>7 Q So -- well, how does the staffing</p> <p>8 affect the complexity of a request?</p> <p>9 A So if a case -- if we deem a case</p> <p>10 complex -- again, it's generally due to the size</p> <p>11 of the case, and I only have 16 staff members in</p> <p>12 total to work on these cases -- earlier I said</p> <p>13 18. I'm taking myself out of this and our</p> <p>14 secretary. Okay. So legitimately people to do</p> <p>15 FOIA processing work, 16 people.</p> <p>16 So if we've deemed a request complex</p> <p>17 because it's -- the volume is high, I mean, I</p> <p>18 have 16 staff members to work on those cases. We</p> <p>19 received 16 -- over 1,600 requests just in 2022,</p> <p>20 16 people to work on all of that, with the</p> <p>21 majority being complex.</p> <p>22 Q So -- so a simple request is -- so,</p> <p style="text-align: right;">Page 188</p>
<p>1 alignment of sort of requests in the simple</p> <p>2 bucket versus the complex bucket, because, I</p> <p>3 mean, we can agree that there are some documents,</p> <p>4 just single individual documents that are more</p> <p>5 than 20 pages, right?</p> <p>6 A Yes.</p> <p>7 Q And if someone -- there's no way to</p> <p>8 narrow a request that's -- you know, even if I --</p> <p>9 if I were to request the DEA staff manual -- we</p> <p>10 were looking at that earlier.</p> <p>11 A Right.</p> <p>12 Q And that's a big document, isn't it?</p> <p>13 A Uh-huh.</p> <p>14 Q And let's say I narrowed my request to</p> <p>15 like three chapters, right?</p> <p>16 A Uh-huh.</p> <p>17 Q I'm already over 20 pages. Do you</p> <p>18 follow me?</p> <p>19 A I do.</p> <p>20 Q But that's not really a complex</p> <p>21 request, is it?</p> <p>22 A It's not. Again, it would be based on</p> <p style="text-align: right;">Page 187</p>	<p>1 really, the difference between simple and</p> <p>2 complex, as I understand it, is just the amount</p> <p>3 of time it's going to take to respond, fair?</p> <p>4 A Yes.</p> <p>5 Q Okay. And --</p> <p>6 A If we feel we can produce it in 30 days</p> <p>7 or less, we categorize it as simple.</p> <p>8 Q Okay. And it might still raise unusual</p> <p>9 circumstances, but it could be simple, right?</p> <p>10 A Let me walk this through in my head.</p> <p>11 Yes, that is true. If I have to search another</p> <p>12 field office and what comes back is two pages and</p> <p>13 I'm able to get it out in ten days, we would deem</p> <p>14 that as simple.</p> <p>15 Q But if you can get it out that quickly,</p> <p>16 it's not really necessary to have extra time to</p> <p>17 be able to complete that request, right?</p> <p>18 A Well, the reason, again, why we would</p> <p>19 have to invoke the extra time is we have to go</p> <p>20 outside of the FOIA office. Sometimes we have to</p> <p>21 go to another state to get the records, right?</p> <p>22 So we don't have access. That's why</p> <p style="text-align: right;">Page 189</p>

<p>1 pronounce her last name. This is the -- a 2 couple -- it's the bottom of page 4 out of 5, 3 just if you can tell me when -- 4 A Okay. 5 Q -- you're there. 6 A Let's see. Page 4. Yes, I'm there. 7 Q And "Check with SC." 8 What's "SC"? 9 A Section chief. She's speaking of me. 10 Q "If these still apply because case is 11 past 30 days," right? 12 A Uh-huh. 13 Q And -- and the fees here that 14 wouldn't -- would not be due are the search fees, 15 right? 16 A We would not have -- you're right. We 17 would not charge search fees for this case or -- 18 Q Because -- 19 A -- any case, really, nowadays because 20 of the amendment. The change in 2016, like I 21 said, really limited our ability to charge search 22 fees.</p> <p style="text-align: right;">Page 194</p>	<p>1 Q And it says, "Drafts need to be closely 2 reviewed under (B)(5)." 3 It's the last sentence. Now, (B)(5) is 4 the deliberative process privilege, true? 5 A Yes. 6 Q And generally speaking, draft agency 7 documents are -- are almost always going to be a 8 deliberative process? 9 A Yes. Anything that's pre-decisional 10 or -- yes. 11 Q Now, if a document, on its face, the 12 first page is pre-decisional or deliberative 13 process -- do you follow me? 14 A Yes. 15 Q Would the DEA end up charging for 16 reviewing the rest of the document? 17 A If the entire document has been 18 deemed -- meaning the entire document is 19 pre-decisional, we're withholding it in full. 20 Q Yeah. I mean, hypothetically, let's 21 say we have like a draft, like what you're -- in 22 your comment, you talk of drafts, and it doesn't</p> <p style="text-align: right;">Page 196</p>
<p>1 Q But it doesn't limit the ability to 2 charge review fee or processing fees? 3 A There isn't a processing fee, per se, 4 but it's review and duplication. Duplication, we 5 don't charge, either -- 6 Q Right. 7 A -- because the days of Xeroxing records 8 is really over. It's all electronically done. 9 Q And it says -- and there were draft 10 letters and e-mails from the share drive. 11 And, actually, let's turn back down to 12 yours, because you say, "Drafts need to be 13 closely reviewed under (B)(5). 14 Do you see that? 15 A I need to see -- which page is that on? 16 Page 4? I'm sorry. 17 Q Sorry. Now we're back on page 5. This 18 is back -- 19 A Okay. 20 Q -- on -- on your comment. It's a 21 May 10th, 2022, 2:27 p.m. comment. 22 A Yes.</p> <p style="text-align: right;">Page 195</p>	<p>1 really go beyond that. But just say draft. 2 Okay? 3 A Uh-huh. 4 Q A draft letter. 5 A Yes. 6 Q The reviewer looks at it. It's a draft 7 letter. It's a (B)(5) withholding. 8 When DEA goes to calculate the review 9 time, is that -- you know, is that sort of 10 calculated -- like line by line is reviewed of a 11 (B)(5) withholding? 12 A So you have to keep in mind that the 13 review has not been done yet. When the -- when 14 the fee is calculated, we are simply looking at 15 how many pages do we have that we're going to -- 16 you know, have to review and process, meaning 17 review -- read the document, determine what is 18 exempt, place (B)(5) exemptions on. That hasn't 19 occurred yet. That comes later, right? 20 Q Understood. But what I'm -- where I'm 21 going with this is the seven-minute-a-page 22 estimate is sort of predicated on the notion that</p> <p style="text-align: right;">Page 197</p>


<p>1 every single page is going to be read, reviewed, 2 redacted. In practice, that never happens when 3 there's withholdings like the one I'm describing 4 now, right?</p> <p>5 A I mean, if you're telling me one -- 6 you're talking about one page, two pages that 7 we're going to exempt in full under (B)(5). We 8 still have to -- there's a -- we have to read the 9 document and place the redaction on the document.</p> <p>10 Q Well, if the -- well, first -- wait. 11 So a (B)(5) withholding is, like, produced as 12 just like a big black box?</p> <p>13 A We basically have to mark the document 14 in a manner that it's very clear that it's being 15 withheld in full under (B)(5). We have to do 16 that in the event that we're appealed or sued by 17 a requester.</p> <p>18 We want -- at the administrative level, 19 we want it to be very clear about our 20 decision-making in these withholdings, so, yes, 21 there is a redaction -- a blanket redaction, if 22 you will, placed on the document.</p> <p style="text-align: right;">Page 198</p>	<p>1 A Yes. And that's why it's called a fee 2 estimate. So if we -- if we overcharged or 3 overestimated, we would owe money back to the 4 requester in the end.</p> <p>5 Q What if someone can't afford the 6 estimate? Is there any -- any way to --</p> <p>7 A Unfortunately -- and, again, this only 8 applies to commercial use requesters -- you know, 9 we -- there are fees that have to be paid for 10 this -- for the process.</p> <p>11 And when you're talking, again, 12 thousands and thousands of pages for review, 13 unfortunately, with the lack of resources, I 14 don't have the ability to just waive the fees 15 there.</p> <p>16 Q Well, how do you determine if someone's 17 a commercial use requester?</p> <p>18 A So we would take a look at what is 19 submitted in the request letter, and if we 20 determine that there is a commercial trade or 21 profit interest in the records sought, we would 22 determine that it's commercial use.</p> <p style="text-align: right;">Page 200</p>
<p>1 Q And that takes seven minutes to put 2 that on?</p> <p>3 A Not on a single page, no.</p> <p>4 Q Okay. But -- and you're talking about 5 like a one to two-page document, but, you know, 6 if you have like a 20-page draft memo, then it's 7 just all 20 pages. Fair?</p> <p>8 A Yes. We would place the blanket, and 9 it should apply to all pages.</p> <p>10 Q And it's not going to take seven 11 minutes to go through and read those documents 12 line by line because they're being withheld, 13 right?</p> <p>14 A Right.</p> <p>15 Q And so when DEA produces its fee 16 estimate that needs to be paid up front, right, 17 that's effectively a max -- that's a maximal -- 18 that's like the most -- assuming DEA went through 19 and reviewed every single page and it was -- and 20 assuming seven minutes a page is an accurate 21 reflection, like, this is the most that you're 22 going to have to pay, right?</p> <p style="text-align: right;">Page 199</p>	<p>1 Q And does it -- does DEA make the 2 determination that it's predominantly a 3 commercial use or just any -- any commercial use?</p> <p>4 A I'm sorry. I don't know that I'm 5 following the question.</p> <p>6 Q Well, something could have a commercial 7 use, but also a non-commercial use. Is that -- 8 is that fair?</p> <p>9 A Potentially, yes.</p> <p>10 Q So -- and is -- is it the agency's 11 position that in deciding who to charge fees, its 12 based on if there's any commercial use of the --</p> <p>13 A It's based --</p> <p>14 Q -- records?</p> <p>15 A -- on information that's provided by 16 the requester. So it has to be clear to us that 17 there's a commercial use. Again, it's really on 18 the requester to tell us -- you know, if they 19 feel they're not a commercial use requestor, they 20 need to articulate that so we can review it.</p> <p>21 Q So -- and -- and I think there are sort 22 of contrasting examples in the record here</p> <p style="text-align: right;">Page 201</p>

<p>1 submitted publicly. What would have been the 2 basis to not release their names on the document? 3 A So, generally, we do not release the 4 names of DEA employees on any document unless 5 that document has already been made publicly 6 available. So we protect -- there is a privacy 7 concern, and so we generally -- excuse me -- we 8 redact those under FOIA exemptions (B)(6) and 9 (7)(C). 10 In this circumstance, I didn't -- I did 11 not believe we were going to withhold their 12 names, but as a courtesy to them, I picked up the 13 phone and I just made sure there were no 14 concerns. And I, you know, had the conversation 15 about it was -- this document, I understand, has 16 already been released in full, you know, just 17 wanted to make sure they had no concerns. But we 18 did not withhold their names. 19 Q So -- so what is the (B)(6) exemption? 20 A This -- oh, excuse me. This is -- 21 protects -- it's a personal privacy exemption, so 22 names -- you know, we redact the names of all of</p> <p style="text-align: right;">Page 210</p>	<p>1 right? 2 A In what regard? I'm sorry. 3 Q Well, the FOIA requires that -- that -- 4 MR. RODRIGUEZ: Objection. Calls for 5 legal conclusion. 6 BY MR. ZORN 7 Q Yeah. FOIA requires that -- that 8 substantive statements of policy be -- be made 9 affirmatively available, right? 10 A It does. 11 Q And so that that -- what you've 12 described sounds like a substantive policy that 13 the agencies are following, right? 14 A Yes. 15 Q And just to be clear about the 16 implication of this policy, would that apply to, 17 like, an e-mail? 18 A It would apply to e-mails. It would 19 apply to all records. 20 Q So it's -- and, you know, if you need 21 to pull up the statute, then that's fine, but I 22 just want to read Exemption 6.</p> <p style="text-align: right;">Page 212</p>
<p>1 our employees under that exemption with the 2 exception of SES personnel. So SES names, we do 3 not redact. 4 Q So is that a -- is that a policy of 5 the -- 6 A This is actually a DOJ policy -- 7 Q It's -- 8 A -- that we follow. 9 Q It's not even written down, right? 10 A It's -- it was captured in a memo that 11 OIP put out a couple of years ago about 12 protecting the names of certain agency, you know, 13 staff, and so we've been following those 14 guidelines ever since. 15 Q Do you know where I can find that OIP 16 memo? 17 A If it's not on their website, you might 18 have to file a FOIA request. I apologize to say. 19 I don't know if that is actually publicly 20 available. 21 Q And if it weren't publicly available, 22 that would be another FOIA violation of the day,</p> <p style="text-align: right;">Page 211</p>	<p>1 It's the position of the United States 2 Department of Justice that names are personnel 3 and medical files and similar files, the 4 disclosure of which would constitute a clearly 5 unwarranted invasion of personal privacy; is that 6 right? 7 A That is -- 8 MR. RODRIGUEZ: Objection. Calls for 9 legal conclusion. 10 You can try to answer. 11 THE WITNESS: That is correct. 12 BY MR. ZORN 13 Q And as a matter of policy, names are 14 being redacted because it's the Department of 15 Justice's contention that those are personnel 16 files? 17 A They're personnel, medical or other 18 files, which basically means it could be any 19 file. So for us, a lot of our records are law 20 enforcement sensitive, and we want to protect the 21 names of our agents, our intel analysts, so on 22 and so forth. We do believe that they have a</p> <p style="text-align: right;">Page 213</p>

<p>1 privacy right.</p> <p>2 Q Well -- and to be fair, there's a</p> <p>3 completely different exemption for law</p> <p>4 enforcement officers, right?</p> <p>5 A We use the combination of (B)(6) and</p> <p>6 (7)(C) to protect their names, yes.</p> <p>7 Q But Theresa Carbonaro is not a -- she</p> <p>8 wasn't -- she isn't and wasn't law enforcement?</p> <p>9 A She is a pharmacologist, as far as I</p> <p>10 know, but we still, depending on the type of</p> <p>11 document, would protect her name under (B)(6) and</p> <p>12 (7)(C).</p> <p>13 Q Which --</p> <p>14 A Not in this circumstance.</p> <p>15 Q So -- but -- and 7 is records or</p> <p>16 information compiled for law enforcement</p> <p>17 purposes?</p> <p>18 A Uh-huh.</p> <p>19 Q But only to the extent the production</p> <p>20 of such law enforcement records or information --</p> <p>21 and then getting down to C -- could reasonably be</p> <p>22 expected to constitute an unwarranted invasion of</p> <p style="text-align: right;">Page 214</p>	<p>1 Q But we can also agree that not everyone</p> <p>2 at DEA is working on law enforcement or sensitive</p> <p>3 tasks with respect to everything that they do; is</p> <p>4 that fair?</p> <p>5 A That is fair.</p> <p>6 Q Okay. And, you know, for example, a</p> <p>7 pharmacologist is not performing law enforcement</p> <p>8 functions in everything that he or she does; is</p> <p>9 that fair?</p> <p>10 A Fair.</p> <p>11 Q But it is the agency's policy, per the</p> <p>12 Department of Justice, not -- not -- this is not</p> <p>13 DEA policy. This is DOJ policy.</p> <p>14 Do you follow me?</p> <p>15 A Uh-huh.</p> <p>16 Q That -- that that person's name needs</p> <p>17 to be redacted regardless of the function they're</p> <p>18 performing?</p> <p>19 A That is correct.</p> <p>20 Q And do you know when this policy</p> <p>21 started?</p> <p>22 A I want to say it was sometime during</p> <p style="text-align: right;">Page 216</p>
<p>1 personal privacy; is that fair?</p> <p>2 A That is correct.</p> <p>3 Q Now, when a person is serving as a</p> <p>4 government servant, what expectation of personal</p> <p>5 privacy is there?</p> <p>6 A So, again, if -- in the -- this has</p> <p>7 been the policy across the department. If --</p> <p>8 generally, employees that are not at the SES</p> <p>9 level, we don't consider to be public facing at</p> <p>10 the same level, and so they have a right to</p> <p>11 privacy, and we want to protect the names of</p> <p>12 those employees.</p> <p>13 Obviously, they work in very</p> <p>14 sensitive -- sensitive matters for the DEA, and</p> <p>15 so our general practice is to redact their names</p> <p>16 below SES level.</p> <p>17 Q Okay. So -- but -- and we can</p> <p>18 certainly agree that there are many, many</p> <p>19 individuals at DEA who do very sensitive law</p> <p>20 enforcement tasks.</p> <p>21 We can agree on that, right?</p> <p>22 A Yes.</p> <p style="text-align: right;">Page 215</p>	<p>1 2019.</p> <p>2 Q Do you know who created the policy?</p> <p>3 A This was captured in a memo that was</p> <p>4 issued from the former director of Office of</p> <p>5 Information Policy.</p> <p>6 Q And what's that person's name?</p> <p>7 A Melanie Pustay.</p> <p>8 Q Okay. And was that signed off on by</p> <p>9 Ms. -- this would have been during the Trump</p> <p>10 administration, right?</p> <p>11 A Yes.</p> <p>12 Q And who was -- do you know who the DOJ</p> <p>13 chief FOIA officer was in 2019?</p> <p>14 A That I do not.</p> <p>15 Q Okay. So we're getting a little far</p> <p>16 field. So let me --</p> <p>17 MR. RODRIGUEZ: Yeah. And we'll go off</p> <p>18 the record?</p> <p>19 MR. ZORN: Yeah.</p> <p>20 (Brief off-the-record discussion.)</p> <p>21 MR. ZORN: Okay. So there's no</p> <p>22 question pending, so why don't I introduce</p> <p style="text-align: right;">Page 217</p>

<p>1 draft up what we call a search memo. We would</p> <p>2 send the memo along with a request letter to our</p> <p>3 point of contact that sits in the office of --</p> <p>4 the Information Technology Division.</p> <p>5 We would have them -- they reach out to</p> <p>6 another unit within that division to actually</p> <p>7 conduct this -- the e-mail search. They use a</p> <p>8 particular tool called Intelra to capture these</p> <p>9 responsive e-mails.</p> <p>10 And then once the search is done -- we</p> <p>11 give the offices five days to complete a search.</p> <p>12 So once we get those records or we're notified</p> <p>13 that the records are ready, my team will go into</p> <p>14 that Intelra site and take -- take the e-mails and</p> <p>15 load them into our own case management system,</p> <p>16 FOIAXpress, to begin processing.</p> <p>17 Q So -- and what -- do you have any</p> <p>18 conception of what percentage of FOIA requests</p> <p>19 are for e-mails?</p> <p>20 A I do not have the percentage, no. I</p> <p>21 wouldn't be able to tell you off the top of my</p> <p>22 head.</p> <p style="text-align: right;">Page 230</p>	<p>1 might not be a fair question, but is there any</p> <p>2 specialized training required to operate this --</p> <p>3 this other system?</p> <p>4 A For Intelra, there was. I had to take</p> <p>5 my team out to the office where -- I had to take</p> <p>6 them to that part of Virginia where the</p> <p>7 intelligence -- I'm sorry -- the Information</p> <p>8 Systems Division sits to train them how to use</p> <p>9 the tool to pull those e-mails and bring them</p> <p>10 into our case management system.</p> <p>11 And there was an SOP written on this,</p> <p>12 and so, yes, there was some training for my staff</p> <p>13 in how to utilize that system.</p> <p>14 Q And -- wait. So the staff knows how to</p> <p>15 use -- the FOIA staff --</p> <p>16 A So --</p> <p>17 Q -- knows how to use --</p> <p>18 A -- let me --</p> <p>19 Q -- that system?</p> <p>20 A -- clarify. So the experts -- the</p> <p>21 subject matter experts that sit in our IT</p> <p>22 division are the ones that actually do the search</p> <p style="text-align: right;">Page 232</p>
<p>1 Q And so is it your understanding -- and</p> <p>2 maybe you don't know, but -- but that there is a</p> <p>3 centralized server with DEA e-mails?</p> <p>4 A Probably. I don't know exactly how</p> <p>5 it's all kept. You know, I'm not -- I admit I'm</p> <p>6 not an IT expert, so --</p> <p>7 Q Okay. And I'm not saying it is or</p> <p>8 isn't the case, but let's just assume there is a</p> <p>9 single server that has all DEA e-mails or some</p> <p>10 database that allows a centralized repository.</p> <p>11 Do you follow me?</p> <p>12 A Yes.</p> <p>13 Q It's still the position of DEA and DOJ,</p> <p>14 for that matter, that because that server isn't</p> <p>15 in the FOIA office, unusual circumstances</p> <p>16 every -- every time?</p> <p>17 A Correct. And the unit that runs the</p> <p>18 e-mails -- does the e-mail searches for us sits</p> <p>19 in another city in Virginia. They're not located</p> <p>20 in our headquarters buildings in Arlington where</p> <p>21 the FOIA office is located.</p> <p>22 Q Could -- is it possible -- I mean, it</p> <p style="text-align: right;">Page 231</p>	<p>1 for the e-mails, and they load them into a tool</p> <p>2 called Intelra. Once that process is done, they</p> <p>3 notify my team it's complete, and then we have to</p> <p>4 log into Intelra to pull those responsive records</p> <p>5 out.</p> <p>6 So they're not searching for records,</p> <p>7 my team. They're basically retrieving the</p> <p>8 material that's already been placed into Intelra</p> <p>9 for them, if that makes sense.</p> <p>10 Q And the accessing Intelra by the FOIA</p> <p>11 staff is done remotely, right?</p> <p>12 A It's -- right. It's done in Arlington</p> <p>13 where we sit, right.</p> <p>14 Q And then you're saying that this IT</p> <p>15 staff is in some other -- and we don't want to</p> <p>16 talk about the location --</p> <p>17 A Sure.</p> <p>18 Q -- but we're just saying it's some</p> <p>19 other location, right?</p> <p>20 A Correct.</p> <p>21 Q Does this process change at all if,</p> <p>22 instead, the FOIA office were on the third floor</p> <p style="text-align: right;">Page 233</p>

<p>1 and the IT office is on the first floor?</p> <p>2 A No. It would be the same process.</p> <p>3 Q So it's unusual circumstances -- well,</p> <p>4 if it were the first and third floor, it would</p> <p>5 still be unusual circumstance, right?</p> <p>6 A It would be, again, because we just</p> <p>7 simply don't have access to the e-mail records.</p> <p>8 We don't have access to the tool to retrieve</p> <p>9 employees' e-mail records. We have to rely on</p> <p>10 someone else to do that for us.</p> <p>11 Q Well, now, retrieving e-mail records is</p> <p>12 a -- it's certainly a function to search and</p> <p>13 produce for FOIA purposes, right?</p> <p>14 A Yes.</p> <p>15 Q I imagine a congressional subpoena</p> <p>16 might be another instance where e-mails had to be</p> <p>17 searched and produced?</p> <p>18 A Uh-huh. Yes.</p> <p>19 Q Are you aware of any other reason that</p> <p>20 the agency would search and produce e-mail</p> <p>21 records other than to respond to a FOIA request</p> <p>22 or subpoena?</p> <p style="text-align: right;">Page 234</p>	<p>1 know, let's say they get a request to collect all</p> <p>2 the e-mails belonging to so and so, that there's</p> <p>3 a good chance that that's because of a FOIA</p> <p>4 request.</p> <p>5 MR. RODRIGUEZ: Objection. Foundation.</p> <p>6 THE WITNESS: Yes, it could be. Yes.</p> <p>7 BY MR. ZORN</p> <p>8 Q Okay. And there are other</p> <p>9 circumstances in which that -- that employee</p> <p>10 might be searching for and producing e-mails,</p> <p>11 fair?</p> <p>12 A Yes.</p> <p>13 Q Like I said, a court subpoena or even</p> <p>14 in this case, we had requests for production.</p> <p>15 This wasn't a FOIA request, fair?</p> <p>16 A Fair.</p> <p>17 Q But a FOIA request is one of the</p> <p>18 situations?</p> <p>19 A Yes.</p> <p>20 Q Okay. And, in fact, it's not an</p> <p>21 uncommon situation?</p> <p>22 A It's not uncommon.</p> <p style="text-align: right;">Page 236</p>
<p>1 A I mean, I can't speak to that. I can</p> <p>2 only speak to my functions in FOIA.</p> <p>3 Q It seems to me that a large part of the</p> <p>4 job of -- of -- if not the predominant part of</p> <p>5 the job of searching this in Intela or --</p> <p>6 sorry -- even gathering the e-mails is FOIA, like</p> <p>7 that -- would you agree?</p> <p>8 A Could you rephrase that question? I'm</p> <p>9 sorry.</p> <p>10 Q This particular function that we've</p> <p>11 been discussing of collecting e-mails to produce,</p> <p>12 it seems to me that a major reason one would do</p> <p>13 that is to respond to a FOIA request.</p> <p>14 MR. RODRIGUEZ: Objection. Foundation.</p> <p>15 You can try to answer.</p> <p>16 THE WITNESS: It -- I mean, it</p> <p>17 represents a percentage, yes, of all FOIA</p> <p>18 requests I receive per year. I wouldn't say</p> <p>19 every request requires us to pull e-mails.</p> <p>20 BY MR. ZORN</p> <p>21 Q And do -- well, no, and I'm talking</p> <p>22 sort of from the IT side of things, which is, you</p> <p style="text-align: right;">Page 235</p>	<p>1 Q In fact, I would venture to say that</p> <p>2 happens multiple times a month that your office</p> <p>3 is asking for e-mails to respond to FOIA</p> <p>4 requests, right?</p> <p>5 A Yes.</p> <p>6 Q What about on a weekly basis? How many</p> <p>7 times a week?</p> <p>8 A So, again, I don't have those</p> <p>9 statistics to tell you, I mean, and it varies</p> <p>10 week to week.</p> <p>11 Q And you know -- you know the folks over</p> <p>12 there by their names. I'm not going to ask them,</p> <p>13 but you do know them --</p> <p>14 A I do.</p> <p>15 Q -- right?</p> <p>16 Because you -- you interface with them</p> <p>17 fairly regularly, right?</p> <p>18 A We do.</p> <p>19 Q Okay. And, in fact, you've met these</p> <p>20 people, right?</p> <p>21 A I have.</p> <p>22 Q They don't work in your office, but you</p> <p style="text-align: right;">Page 237</p>

<p>1 CERTIFICATE OF NOTARY PUBLIC</p> <p>2 I, ERICK M. THACKER, the officer before whom</p> <p>3 the foregoing deposition was taken, do hereby</p> <p>4 certify that the witness whose testimony appears</p> <p>5 in the foregoing deposition was duly sworn by me;</p> <p>6 that the testimony of said witness was taken by</p> <p>7 me in stenotype and thereafter reduced to</p> <p>8 typewriting under my direction; that said</p> <p>9 deposition is a true record of the testimony</p> <p>10 given by said witness; that I am neither counsel</p> <p>11 for, related to, nor employed by any of the</p> <p>12 parties to the action in which this deposition</p> <p>13 was taken; and, further, that I am not a relative</p> <p>14 or employee of any counsel or attorney employed</p> <p>15 by the parties hereto, nor financially or</p> <p>16 otherwise interested in the outcome of this</p> <p>17 action.</p> <p style="text-align: center;"></p> <p style="text-align: center;">18 ERICK M. THACKER</p> <p style="text-align: center;">19 Notary Public in and for the</p> <p style="text-align: center;">20 District of Columbia</p> <p>21 My commission expires:</p> <p>22 June 30, 2024</p> <p style="text-align: right;">Page 258</p>	<p>1 jimmy.rodriquez2@usdoj.gov</p> <p>2 January 19, 2023</p> <p>3 RE: AIMS Institute, PLLC, Et Al. v. Garland, Merrick, Et Al.</p> <p>4 DEPOSITION OF: Kelleigh Miller 5645328</p> <p>5 The above-referenced witness transcript is</p> <p>6 available for read and sign.</p> <p>7 Within the applicable timeframe, the witness</p> <p>8 should read the testimony to verify its accuracy. If</p> <p>9 there are any changes, the witness should note those</p> <p>10 on the attached Errata Sheet.</p> <p>11 The witness should sign and notarize the</p> <p>12 attached Errata pages and return to Veritext at</p> <p>13 errata-tx@veritext.com.</p> <p>14 According to applicable rules or agreements, if</p> <p>15 the witness fails to do so within the time allotted,</p> <p>16 a certified copy of the transcript may be used as if</p> <p>17 signed.</p> <p>18 Yours,</p> <p>19 Veritext Legal Solutions</p> <p>20</p> <p>21</p> <p>22</p> <p style="text-align: right;">Page 260</p>
<p>1 AIMS Institute, PLLC, Et Al. v. Garland, Merrick, Et Al.</p> <p>2 Kelleigh Miller 5645328</p> <p>3 ACKNOWLEDGEMENT OF DEPONENT</p> <p>4 I, Kelleigh Miller, do hereby declare that I</p> <p>5 have read the foregoing transcript, I have made any</p> <p>6 corrections, additions, or changes I deemed necessary as</p> <p>7 noted above to be appended hereto, and that the same is</p> <p>8 a true, correct and complete transcript of the testimony</p> <p>9 given by me.</p> <p>10</p> <p>11 _____</p> <p>12 Kelleigh Miller Date</p> <p>13 *If notary is required</p> <p>14 SUBSCRIBED AND SWORN TO BEFORE ME THIS</p> <p>15 _____ DAY OF _____, 20____.</p> <p>16</p> <p>17 _____</p> <p>18</p> <p>19 NOTARY PUBLIC</p> <p>20</p> <p>21</p> <p>22</p> <p style="text-align: right;">Page 259</p>	<p>1 AIMS Institute, PLLC, et al. vs. Merrick Garland,</p> <p>2 et al.</p> <p>3 Kelleigh Miller (#5645328)</p> <p>4 E R R A T A S H E E T</p> <p>5 PAGE _____ LINE _____ CHANGE _____</p> <p>6</p> <p>7 REASON _____</p> <p>8 PAGE _____ LINE _____ CHANGE _____</p> <p>9</p> <p>10 REASON _____</p> <p>11 PAGE _____ LINE _____ CHANGE _____</p> <p>12</p> <p>13 REASON _____</p> <p>14 PAGE _____ LINE _____ CHANGE _____</p> <p>15</p> <p>16 REASON _____</p> <p>17 PAGE _____ LINE _____ CHANGE _____</p> <p>18</p> <p>19 REASON _____</p> <p>20</p> <p>21 _____</p> <p>22 KELLEIGH MILLER Date</p> <p style="text-align: right;">Page 261</p>